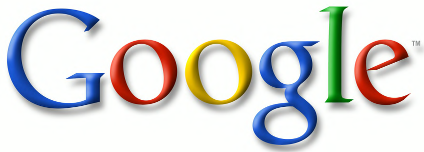
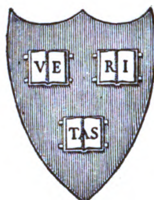



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A MANUAL OF
HINDU LAW.

A MANUAL OF

HINDU LAW

ON THE BASIS OF

SIR THOMAS STRANGE,

LATE CHIEF JUSTICE OF MADRAS,

AND ILLUSTRATED

BY THE DECISIONS OF THE COURTS

OF ALL THE PRESIDENCIES, AND OF THE PRIVY COUNCIL,

BY

REGINALD THOMSON, ESQ.,
OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW,
AND AN ADVOCATE OF THE HIGH COURT OF MADRAS.

Let him (the king) establish the laws of the conquered nation, *as declared in their Books.* MENU, ch. vii, v. 203.

THIRD EDITION.
(*Revised and Enlarged.*)

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and to the Madras University.
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To

The Honorable

SIR ROBERT STUART, KT., Q.C.,

Chief Justice of the North West Provinces.

MY LORD CHIEF JUSTICE,

I need hardly say it gives me much pleasure to be allowed to dedicate this Book to you.

As a Member of the Bar, I cannot but feel a high respect for your Lordship's attainments, and judicial capacity, but apart from this, your Lordship has laid me under obligations, for which, I trust, I shall always feel grateful.

Without holding your Lordship responsible for any of the opinions herein expressed, I am,

My Lord Chief Justice,

Your Lordship's much

obliged and faithful servant,

REGINALD THOMSON.

PREFACE TO THE THIRD EDITION.

THE third edition of this *Manual of Hindu Law* has been revised and considerably improved. Having been made the *Text Book* for the *Special Test Examination*, care has been taken to make it as accurate as possible. New sections have been added; several of the old sections have been more logically arranged; new cases have been noted up; large additions have been made to the notes, and to the Appendices; and an Index also has been added to the work. It is hoped, therefore, it will prove useful as a *Handy Book* to the lawyer, as well as a *Manual* for the student.

Various authorities as will be seen have been consulted, including *Mr. Mayne's* recent Treatise on Hindu Law. I have always adopted *Mr. Mayne's* view of the law as being the clearest, and most in accordance with decided cases.

I have but little more to add. I still adhere to the views expressed in the last, as well as in the present edition, regarding *Stridhana* and women's rights. There can be little doubt the present decisions on these questions are an innovation in Southern India. That innovation was introduced in 1865 by the judgment of the High Court reported in 2 Madras Reports, and alluded to in the text.

Up to that time in the days of the late *Sudr*, and previously by *Sir Thomas Strange*, it had been always held that

property *inherited* by a woman forms her *Stridhana.* And this opinion is still held by eminent Orientalists.[a] Opinions to the contrary, though founded upon the Commentary of *Vijianeçwara*, are rather ingenious theories, which owe their origin to the fertility of the minds that made them. Unaccustomed, as we are, to the peculiar mode of reasoning adopted by Hindu Commentators, we have, nevertheless, applied the rules of our system of logic to the development of what we conceived to be the author's meaning. And, therefore, it is a legitimate observation to make that, a correct exposition of the *Çloka* cannot be arrived at, except by a mind thoroughly imbued with oriental literature, and accustomed to oriental habits of thought. The decisions of the Courts, however, have settled these questions, and there is nothing left for it but to accept them.

It is now almost too late to oppose this current of authority. Some writers have even gone so far as to maintain that the bulk of the law administered at the present day to so-called Hindus is not at all applicable to them, and that their rights should be adjudicated upon

a The High Court of Pondicherry also maintains this view of the law. See *M. Alexandre Eyssett's* Jurisprudence and Doctrines of the High Court of Pondicherry, Vol. I, 178, 314, 324, 374, 445 where decisions on these questions are given: confer also *M. Laude's Manual of Hindu Law*, 153 *et seq.*, where the decision of the Madras High Court above referred to is discussed and dissented from. *Sir Henry Maine*, too, in his *Village Communities*, 55, says: "Here again I am assured that any practice corresponding to this doctrine (the new doctrine propounded) is very rarely found in the unwritten usage under which, not only does the widow tend to become a true proprietress for life, but approaches here and there to the condition of an absolute owner." The *Thesawaleme*, or Summary of the Laws of the *Tamulians* of Ceylon shows that the wife and the widow have the fullest enjoyments of their rights and liberties, a state of things which bears a very favorable contrast with the condition of women in Southern India. The contrast is the more striking when it is remembered that these *Tamulians* are the descendants of emigrants from this country.

according to custom and usage. These ideas have been recently enforced with much vigor and ability in a series of leading articles in the *Indian Jurist.*[a] They embody the views more or less already expressed by *Mr. J. H. Nelson*, of the *Madras Civil Service*, in his View of the Administration of Hindu Law. But it is more than doubtful whether even so ardent and able a reformer as *Mr. Nelson* will be able to effect the change he advocates. The bent of the judicial mind is very clearly indicated by the *Hon'ble Mr. Justice Innes* in his judgment in the *Sivagungah* case. His Lordship, while touching on this very question, remarks: "If this course were followed, nearly thirty millions of people in this Presidency alone would be left without any ascertained law of succession and the difficulties of arriving at a decision in each case would be complicated by a richer growth of perjury and forgery than has ever been seen. The non-*Aryan* tribes of the Peninsula and none more so than the *Maravers* may be trusted to be alive to their own interests. It may well be that originally the Hindu Law had no application to them. But it is not the case that the Courts have declined to administer their rights of succession under laws other than the Hiudu Law by which they may have claimed to be governed. If they and other Indian non-*Aryan* tribes have come, as indeed they always have come, to the Courts on the footing that they are governed by the Hindu Law, stating their rights in accordance with that law and appealing to the books and authorities which are recognized as guides to decisions of rights

a The binding authority of the generally received text books has also been disputed. One thing, however, seems doubtful, and that is whether we have reliable translations of these text books. *Professor Goldstücker* was of opinion that "a thorough revision of all the translations of the Hindu Law texts hitherto used in Indian Courts should be undertaken at once."

of persons subject to that law, it is reasonable to assume that though they may not have been originally bound by its provisions, they have long ago conformed to and adopted it, and that the Courts have not erred in administering it to them." These remarks take a very practical view of the question, and appear to be unanswerable.

In conclusion, I would express my regret (a regret, doubtless, shared by many) that India has lost the services of *Dr. Burnell*, who has been compelled to retire from his labors, owing to ill-health. India, and particularly the Madras Presidency, can ill afford to lose the services of so distinguished a *savant*.

REGINALD THOMSON.

MADRAS,
May, 1881.

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ADDENDUM TO CHAPTER VIII.

CHARGES ON THE INHERITANCE.

I AM indebted to my friend, *M.R.Ry. P. Tirumal Rau Garu,* Subordinate Judge of Tinnevelly, whose industry and research are well known, for the following authorities *pro* and *con* on the vexed question, Whether an undivided estate of a joint Hindu family can be sold in execution of a decree passed against one of the members of the family, on account of the money borrowed for the use or benefit of the family.

PRO. I. *Privy Council* in *Girdhari Lal* v. *Kantoo Lal*, I. L. R., Ind. App., 321; 9 *Madras Jurist*, 297; 22 Cal. W. R., 56; and in *Bissesur Lal Sahoo* v. *Maharajah Luchmeesur Singh*, 6 L. R., Ind. App., 233; 3 *Indian Jurist*, 569.

II. *Calcutta High Courts* in *Luchmee Dai* v. *Asman Singh*, I. L. R., 2 Cal., 213; *Adromoni Dai* v. *Chowdry Sib Narrain Kus*, 3 Ib., 1; (6 Ib., 135.)

III. *Bombay High Court* in *Babajee Madhuljee* v. *Kristnaji*, I. L. R., 2 Bom., 666; *Samala Bhai* v. *Someshwar*, 5 Ib., 38.

IV. *Allahabad High Court* in *Deva Singh* v. *Ram Manahur*, I. L. R., 2 All., 746; *Ram Sevak Das* v. *Raghubur Roy*, 3 Ib., 72; *Radhakishan* v. *Buchhaman*, 3 Ib., 118;

Dursu Pandey v. *Bikaramjit Lal*, 3 Ib., 125; *Gaya Din* v. *Raj Bunsikuar*, 3 Ib., 191.

CON. I. *Privy Council* in *Deendayal Lal* v. *Jugdeep Narrain Singh*, 4 L. R., Ind. App., 247; I. L. R., 3 Cal., 198; 1 *Indian Jurist*, 604; and in *Surj Bunsi Koer* v. *Sheo Prasad Singh*, 6 L. R., Ind. App., 88; I. L. R., 5 Cal., 148; 3 *Indian Jurist*, 284.

II. *Calcutta High Courts* in *Bheek Narriain Singh* v. *Janak Singh*, I. L. R., 2 Cal., 438; *Rai Narrain Das* v. *Nowneet Lal*, 4 Ib., 809; *Saljee Sahoy* v. *Fakeer Chand*, 6 Ib., 135.

III. *Madras High Court* in *Venkatasami Naik* v. *Kuppien*, I. L. R., 1 Mad., 354; *Venkataramien* v. *Venkata Soobramanya Deekshatar*, 1 Ib., 358; *Koopookonan* v. *Chinnayan Pillay*, S. A., 221 of 1876, Madras Mail Law Rep., 63; and in *Ramasami Chetty* v. *Subien Chetty*, S. A., 66 of 1879, 4 *Indian Jurist*, 399 but *contra*, 6 L. R., Ind. App., 233.

IV. *Bombay High Court* in *Babajee* v. *Vasuden*, I. L. R., 1 Bom., 95; and in *Narsimbhut* v. *Chenapah*, 2 Ib., 479.

V. *Allahabad High Court* in *Chamaili Kur* v. *Ram Prasad*, I. L. R., 2 All., 267.



A MANUAL

OF

HINDU LAW.

CHAPTER I.

THE SCHOOLS AND AUTHORITIES OF HINDU LAW.

1. THE laws of the Hindus, civil and religious, are by them believed to be alike founded on revelation. They consist of the *Sruti* (revealed law), which includes the *Vedas*, and the *Smṛti* (remembered law), which comprises forensic law, or the *Dharma Çastra.*[a] Sruti and Smrti.

2. Forensic law is to be sought primarily in the Institutes *(Smṛtis* or *Text-books)* attributed to holy sages under the assumed names of *Manu*, *Yâjña-valkya* and others. But *Glosses* and *Commentaries* published under successive dynasties have been written upon these, which together with the *Digests*, are now regarded as conclusive authorities, and are preferred to the *Text-books.* Authorities of Hindu law.

3. There are five distinct schools of law which differ more or less from each other. They may be termed the schools of *Bengal*, of *Benares*, of *Mithila*, of the *Dekhan (Dravida)*, and of the *Mahrattas* (Western India). The original *Smṛtis* are of course Schools of law.

a 1 Strange's Hindu Law, 315, Colebrooke.

common to all, but they each assign the preference to particular Commentators and Scholiasts.[a]

4. There are, however, but two principal schools of law—that of Southern India which follows the *Mimâmsâ* (the rules of the interpretation of precepts or logic): while in the East (Bengal and Behar) the *Nyáyá* (dialectics) is followed. These are divided into sects of jurisprudence, which altogether form five.[b]

5. These schools differ but slightly from each other, except the school of Bengal, which differs from the others on several points relating especially to the Law of Inheritance. The doctrines of the Bengal school are somewhat in advance too of those of the others, and tend towards the separation of law from religion.

The *Dharma Çastra.*

6. The *Manava Dharma Çastra*, or Institutes of *Manu*, the highest authority of memorial law, is admittedly not only the oldest work, but also the holiest after the Vedas, and is considered the basis of the present system of Hindu Jurisprudence. It is divided into three classes: first, the *Smr̃tis* or *Text-books*, which are the foundation of all Hindu law. Second, *Vyakhyana* or *Glosses* and *Commentaries* upon the *Smr̃tis*, many of which partake of

a Morley's Digest.

b 1 Strange's Hindu Law, App. This division of Hindu Law into schools has been disputed by some writers—among others Dr. Burnell, who says the distinction of "schools of law" is entirely strange to the Hindu Law books and is quite meaningless. It is without foundation and useless. Introduction to Burnell's *Dâya-Vibhâga*.

the nature of Digests. Third, the *Nibandhana Grandha*, or Digests properly so called, either of the whole body of the law, or of particular portions thereof collected from the Text-books and their Commentators.[a]

7. The works that are included in the *Dharma Çastra* are according to the opinion of the Brahmans to be divided into two classes, *viz.*:

I. *Smṛtis*, or works based on a recollection of some revelation.

II. Works based as the first but of purely human authorship.

Of these a slight critical examination, however, furnishes a different classification, *viz.*:

I. Original *Sûtra* works which consist almost entirely of prose.

II. 1. Various redactions (mostly in verse) of the first mentioned works.

2. Recasts of such redactions.

3. Original works such as *Bhojas* composition and the "*Sangraha*."

4. Forgeries to promote Sectarian objects.

To these two classes may be added a third, *viz.*:—

1. Commentaries on works of the first and second classes and

2. Digests of extracts from the same works.

a Introduction, Morley's Digest.

In a general way the above classification represents pretty correctly the relative antiquity of these works, but it would not be safe to assume that it is so in regard to each separate work.[a]

Commentaries.

8. Among the numerous Commentaries on the Institutes of *Manu*, the most esteemed are a commentary of *Medhatithi:* another by *Govinda Raja:* a third by *Dharanidhera:* and the celebrated gloss of *Kullakabhatta*, entitled *Menuvurtha Muctavali.*[b]

9. There are other legislators of repute besides *Manu*. The principal are *Yâjñavalkya*, *Apastamba*, *Katyayana*, *Vrihaspati*, *Pareçwara*, *Vyasa*, son of *Pareçwara*, and the reputed author of the *Puranas*, *Çancha* and *Lichita*, *Gautama* and *Vasishtha.*[c]

10. These heroic personages are reputed to be the authors of Institutes similar to *Manu's*. Some of these have well known Commentaries, such as the *Mitâxarâ* of *Vijianeçwara* on the text of *Yâjñavalkya*, and the *Mâdhavîya* of *Vidjanarayanaswami* on the text of *Pareçwara*. Other important Commentaries are the *Smṛti Çandrikâ* by *Devânda Bhaṭṭa:* the *Vivada Chintamani*, the *Vyavahara Mayukha* and the *Viramitrodaya:* also the *Saraswati Vilasa*. To these may be added the works of *Çri Rama Pandita*, the *Subodhini* by *Viseçwara* and the work of *Balambhatta*, the two latter on the *Mitâxarâ*, and

a Burnell's *Dâya-Vibhâga*.

b Preface, Colebrooke's Digest.

c Ibid.

much relied on by Colebrooke in his translation of that work.[a]

11. Among the Digests the following are some of the principal. The *Dharma Ratna* of *Jimuta Vahana:* the Chapter on Inheritance being the celebrated *Dâya-bhâga* on which there is a remarkable Commentary by *Çri Krishna Taikalankara.* The latter has written an epitome of the Law of Inheritance called *Dayakraya Sangraha*, translated by Mr. Wynch; the *Smṛti Tatwa* of *Raghunandana;* the *Vivada Ratnakara*, the *Nirnaya Sindhu* and others. Of modern Digests, the *Vivada Bhangarnava* by *Jagannatha*, translated by Colebrooke, is the most important, especially on the Law of Contracts.[b] Digests.

12. (i.) The authorities last cited except the *Vivada Ratnakara* and the *Nirnaya Sindhu* are standard in the Gauriya or Bengal school, particularly the *Dâya-bhâga*, translated by Colebrooke, which is almost on every disputed point opposed to the *Mitâxarâ*,[c] and the *Smṛti Tatwa*, the greatest authority of all, a complete Digest in twenty-seven volumes. The portion on inheritance is called the *Daya Tatwa*, and is highly praised by Colebrooke. Bengal Authorities.

(ii.) The leading authorities of the Benares school, to which the Madras school belongs, are the *Mitâxarâ*, *Viramitrodaya*, *Mâdhavîya*, and *Nirnaya Sindhu*. Benares.

a Introduction, Morley's Digest.

b Ibid.

c The great differences between the *Dâya-bhâga* and *Mitâxarâ* arise from attempts to define property. Burnell's *Dâya-Vibhâga*.

Mithila. (iii.) Of Mithila: the *Mitâxarâ*, *Vivada Ratnakara*, *Vivada Chintamani*, translated by the late Honorable Prossonno Tagore, *Vyavahara Chintamani*, *Smṛti Tara* and others.

Madras. (iv.) Of the Dravidian or Madras school: the *Mitâxarâ* of *Vijianeçwara*, treating of inheritance, on which subject it is a standard work of reference. The portion on inheritance has been translated by Colebrooke.

The *Smṛti Çandrikâ*, a treatise on judicature by *Devânda Bhaṭṭa*, considered by Colebrooke to be a work of uncommon excellence. A reliable translation has been published by T. Krishnasamy Iyer, a Small Cause Judge in the Madras Presidency.

The *Mâdhavîya* by *Vidjanarayanaswami* (*Mâdhava*) on the text of *Pareçwara* a work of extensive research and copious disquisition, a small portion has been translated by Dr. Burnell, an eminent oriental scholar, District Judge of Tanjore.[a]

The *Saraswati Vilasa* by *Pratapuradradeva*, a prince of the Telingana country, the next authority to the *Mitâxarâ* in Southern India.

The *Vyavahara Mayukha*, a treatise on civil and criminal jurisprudence, by *Nilakantha*, translated by Borrodaile. The above five works are considered of great authority and are generally referred to as the *Puncha Grandha*.

a This work is spoken of in the text as Burnell's *Dâya-Vibhâga*.

The *Nirnaya Sindhu* by *Kamalakara Bhat*, treating of social and religious duties: the *Varadarajaya* similar to the *Smr̃ti Çandrikâ* and others. The latter has also been translated by Dr. Burnell.

(v.) Of the Mahratta school (Western India): The *Mitâxarâ*, *Mayukha*, *Nirnaya Sindhu*, *Madhaviya* and others.[a] **Maharastra or Western India.**

13. Except the *Dâya-bhâga* and its commentaries, all the other treatises on law are mere recasts of the *Mitâxarâ* and the *Smr̃ti Çandrikâ* and written entirely without reference to local peculiarities. Practically speaking indeed *Sanskrit* law commences with the *Mitâxarâ*, a commentary on the *Yâjñavalkya Smr̃ti* by *Vijianeçwara.* This work most likely belongs to the eleventh century and on it about a century and a half later was based the work of *Devânda Bhaṭṭa*, the *Smr̃ti Çandrikâ.* The author of this work closely followed the opinions of the *Mitâxarâ*, but altered the arrangement slightly, expanded the practical part, and abridged some of the *Mimâmsâ* dissertations. The *Smr̃ti Çandrikâ* is remarkable for good common sense, and is eminently adapted for use by practical men. The *Mâdhavîya* treatise on jurisprudence, the next of importance, so far as the Law of Inheritance goes, is also little more than an abridgment of the *Mitâxarâ*, except in some of the last sections. Its author **Origin of *Sanskrit* law.**

a As to above authorities generally, see Introduction, Morley's Digest.

As to Madras authorities, see also 2 Madras Reports, 206.
Strange's Manual, Chap. 1.

Mâdhava is nominally the last great original *Sanskrit* author in India, except the famous *Vedântâçârya*, the author of countless works, in all branches of *Sanskrit* literature.[a]

Dattaka Mimâmsâ and Dattaka Çandrika.

14. There are also two treatises on adoption of standard excellence and acknowledged by all the schools, namely, the *Dattaka Mimâmsâ* by *Nanda Pandita*, the most celebrated work extant on this subject, and a more concise treatise, the *Dattaka Çandrikâ* by *Devânda Bhaṭṭa*, the author of the *Smṛti Çandrikâ*, and supposed to be the basis of the former.[b]

Duty of Judge.

15. The duty of the Judge is not so much to inquire whether a disputed doctrine is fairly deducible from the ancient authorities, as to ascertain whether it has been received by the particular school which governs a particular district and has there been sanctioned by usage.[c]

Alterations of the law by legislative enactments.

16. Some portions of Hindu law have become obsolete, and others have been altered by legislative enactments. Primogeniture as a general rule of inheritance has ceased to exist: Slavery has been abolished by Act V of 1843: Act XV of 1856 authorizes the re-marriage of widows, divesting

a Introduction to Burnell's *Dâya-Vibhâga*. The authors of the Commentaries and Glosses may be considered the first *Sanskrit* lawyers. *Vedântâçârya* was the founder of *Vaishnavism* in South India.

b Introduction, Morley's Digest.

c 12 Moore's Indian Appeals, 397.

them in such a case, however, of all right to maintenance out of the property of their deceased husbands, as well as of all right of inheritance to them: *Suttee* no longer exists under Regulation I of 1830: under Act XXI of 1850 apostacy and exclusion from caste cannot now affect the right of inheritance: Act XXI of 1866 provides for the dissolution of marriage of Native Converts, whilst the Wills of Hindus are recognised by Regulation V of 1829, Act XXVII of 1860, and Act XXI of 1870, the Hindu Wills Act for Presidency Towns; Act IX of 1875, the Indian Majority Act, extends the period of minority under the general Hindu Law to *eighteen* years; and lastly, the Madras Civil Courts Act of 1873 regulates the trial of suits in which Hindus and others are concerned.

17. The *status* of Christian converts has also been decided upon by the Privy Council to the effect that upon the conversion of a Hindu to Christianity, the Hindu law ceases to have any continuing obligatory force upon the convert—that the convert may renounce the old law of which he was bound as he has renounced the old religion, or, if he thinks fit that he may abide by the old law, notwithstanding he has renounced the old religion, that the convert, though not bound as to his rights and interest in property, either by the Hindu law or by any other positive law, may by his course of conduct after his conversion have shown by what law he intended his rights to be governed—that the *lex loci* Act XXI of 1850 does not apply where the parties have ceased to be Hindus in religion—and that the conversion Christian Converts.

2

of a Hindu to Christianity amounts by the Hindu law to a severance of parcenership.[a]

Maravars. 18. The Hindu law is also held applicable to *Maravars* and others of the very lowest caste. The absurdity of this has impressed itself upon the Courts, but it is considered too late to alter this condition of things.[b] Others again are governed by custom and usage for enforcing which provision is made in the Madras Civil Courts Act of 1873.

Law of Hindus migrating. 19. A family of Hindus on migrating may adopt the precepts and customs of the country they migrate to, and may abandon those of their own country. The law of a Hindu family is presumed to be that of its origin, and not that of its new domicile.[c]

Free of Custom. 20. Custom has always been to a great extent superior to the written law in India and especially so in the south; but the Indian Jurists never attempted to record such merely human details, hence the difficulty of the law of marriage and caste usages on which questions of inheritance often depend. By

a 9 Moore's Indian Appeals, 195. This was the decision in the *Abraham* case from the Bellary District. The *Abrahams* were Native Christians who adopted European manners and customs.

b 6 Madras Reports, 310. In this case Mr. Justice *Holloway* remarks "I must be allowed to add that I feel the grotesque absurdity of applying to these Maravars the doctrine of Hindu law. It would be just as reasonable to give them the benefit of the Feudal law of real property. At this late day it is however impossible to act upon one's consciousness of the absurdity. I would not however be supposed to be unconscious of it." This subject has been very fully discussed by Mr. J. H. Nelson in his View of the Administration of Hindu law.

c 2 Moore's Indian Appeals, 132.

custom only can the *Dharma Çastra* here be the rule of others than Brahmans and even in the case of Brahmans it is very often superseded by custom.[a]

Malabar and Canara Law.

21. In Malabar "the rule of nephews," or the *Marumakkatayum* law prevails as to property which will be noticed in a separate Chapter. In Canara also a similar law called *Aliya Santana* exists. It differs only from that of Malabar in more consistently carrying out the doctrine that all rights to property are derived from females.[b]

CHAPTER II.

ON PROPERTY AND ITS ALIENATION.

Kinds of property.

22. PROPERTY, according to Hindu law, is of four descriptions—*real, personal ancestral and self-acquired.* Under the first head is included not only what is ordinarily considered immovable property, such as land but also assignments thereon corresponding to *corodies* under English law.[c]

Descent of real and personal property.

23. Real and personal property under Hindu law do not descend in the same way as they do under English law. Under the latter realty goes to the heir, while personalty passes under a will,

a Introduction to Burnell's *Dâya-Vibhâga.*

b 1 Madras Reports, 380. *Per Holloway*, J.

c W. H. Macnaghten's Hindu Law, 1, 2nd ed. A *corody* is an incorporeal heriditament (a right of maintenance) charged on the *person* of an owner of an inheritance in respect of such inheritance.

or according to the Statute of Distributions. Among Hindus they descend to the same persons alike.

Definition of ancestral property.

24. Ancestral property besides what is strictly termed the family property, includes also the acquisition of a coparcener, when such acquisition has been made with the aid of the family funds.[a]

25. The ordinary gains of science, therefore when made by one who has received a family maintenance are partible.[b]

Definition of self-acquired property.

26. Self-acquired property, in its widest sense, includes everything that has been obtained *without the aid of the family property*, as well as ordinary and nuptial gifts, the former not having been made in return for something previously given, the latter being such as a man receives with his wife, as also the presents made to the father or kinsmen of the bride, in the *Asura* form of marriage, but these must be exclusive to the donee.[c]

Recovered property.

27. Lost ancestral property recovered without the aid of the family funds and with the privity of the co-heirs ranks also as self-acquisition.[d]

Presumption as to ancestral property.

28. A Hindu's property is presumed to be ancestral and not self-acquired.

a 1 Strange's Hindu Law, 213, 214, 215.

b 2 Madras Reports, 56; 4 Ibid., 5. A Vakil's gains are now held to be *impartible*. According to the above *dictum* it was once held to be otherwise.

c 1 Strange's Hindu Law, 215-217.

d Ibid.

29. According to the *Mitâxarâ* a son has by birth a co-ordinate interest in ancestral property and can compel a partition in his father's lifetime. He has however only an interest in property which belonged to his father at the time of his birth, and has no legal claim to property of which a *bonâ fide* disposition effectual as against his father, had been made long before he was born.[a] In Bengal birth is not considered as a means of acquisition, and heritage arises only upon the death of the father, natural or civil. Inchoate rights of son.

30. Ancestral property (real) cannot be alienated without the consent, express or implied, of the co-heirs, except when they are minors and the alienation is for their benefit, in which case their consent will be always implied; while ancestral property (personal) may be so alienated only for purposes warranted by texts of law. This applies to joint property beyond the share of the actual alienor.[b] Alienations.

31. Personal property, however, ancestral or self-acquired, and self-acquired real property may be alienated by a co-parcener without the consent of the others.[c]

a 1 Strange's Hindu Law, 57; 4 Madras Reports, 307.

b Ibid., 19-21, 25, 200, 201; 2 Ibid., 340, 348, 436, Colebrooke; 1 Madras Reports, 412; 6 Sutherland's Weekly Reporter, 71; 10 Ibid., 287; 1 Bombay Reports, A. C., 27.

c *Sed quære* as to self-acquired *real* property and *ancestral* movables. 2 Strange's Hindu Law, 436, Colebrooke; 1 Macnaghten's Hindu Law, 2-3; 2 Digest, 32, *Vrihaspati;* 1 Madras Reports, 412; 7 Madras Reports, 25. In this case *Innes*, J., held that the right of disposition depended upon the fact as to whether the coheir was or was not *in being* at the time of the disposition. The Privy Council have thus laid down the proposi-

32. Of course a single individual may alienate self-acquired property of any kind, if the alienation be made by himself. A married man, too, without male issue, may alienate self-acquired immovable property.[a]

33. Under the *Mitâxarâ* in Southern India a co-parcener has full power of alienation over *his own share*, and the son cannot interfere. It has been held to be *otherwise* under the *Mitâxarâ* law in Bengal, Western India, and North Behar (Mithila.)[b]

tion: "A Hindu *without male descendants*, may dispose by will of his separate and self-acquired property, whether movable or immovable; and that one *having male descendants* may so dispose of self-acquired property, *if movable*, subject perhaps to the restrictions that he cannot wholly disinherit any one of such descendants." 12 Moore's Indian Appeals, 38.

The true rule with regard to *ancestral movables* seems to be that the father has a special power of dealing with them, but only for certain special purposes specified by the *Mitâxarâ*. Mayne's Hindu Law, Sec. 291, 2nd ed., citing 1 Indian Law Reports (Bombay) 561, which practically overrules 1 Bombay Reports, Appendix 76 (2nd ed.)

a 1 Strange's Hindu Law, (200-202) and above cases.

b 1 Madras Reports, 471; 2 Ibid., 416; 4 Ibid., 60.

3 Bengal Reports, F. B., 39. In this case *Peacock*, C. J., held that the law against such alienations had so existed for half a century in Bengal and could not therefore be unsettled on the strength of Madras or Bombay decisions. In Bombay though such alienation cannot be made by *gift* or by *will* yet it is settled law that a co-parcener may alienate his share for valuable consideration and that it may be taken in execution. 6 Bombay Reports, 249; 10 Ibid., 139, 162.

5 Sutherland's Weekly Reporter, 221. In this case however there was collusion with the purchaser.

9 Ibid., 469.

3 Bombay Reports, A. C., 66. So it has recently been decided by the Privy Council affirming a case from Bombay that a co-parcener cannot dispose of *by will* his undivided share without the consent of his co-heirs. 4 Indian Jurist, 472.

34. There may be a valid sale of such a share upon an excution.[a]

35. Under the *Mitâxarâ*, however, in Madras a coparcener cannot *before partition* convey away as his interest any specific portion of the joint property.[b]

36. It may be broadly stated that in Bengal at least a man may alienate as he pleases, property of any kind by gift, sale, or will; for although there is an undoubted restriction as to the alienation of ancestral *real* property, yet the alienation when made is valid upon the principle of *factum valet*, which prevails in that school.[c]

37. An alienation made with the consent of the son cannot be questioned by the grandson.[d]

38. To justify an alienation of ancestral property a legal necessity must be strictly proved and such necessity cannot be inferred from the habits and general character of a vendor.[e] **Causes of alienation.**

39. The *Çraddha* of a mother is not such a legal necessity, as that of the father is, to justify a sale.[f]

a 1 Madras Reports, 471. See further Chapter VIII.

b 8 Ibid., 6.

c 1 Strange's Hindu Law, 21, 23-25; 1 Madras Reports, 54; 4 Bengal Reports, O. C., 31, 159; 3 Ibid., F. B., 39; 5 Sutherland's Weekly Reporter, 221; 9 Ibid., 469; 3 Bombay Reports, A. C., 66; 6 Moore's Indian Appeals, 344.

d 9 Sutherland's Weekly Reporter, 337.

e 8 Bengal Reports, Appendix, 5, 8 Sutherland's Weekly Reporter, 15.

f 7 Sutherland's Weekly Reporter, 146.

40. The payment of family debts, or the existence of a decree which may at any time be executed against ancestral property is a clear necessity for an alienation. A debt under ordinary circumstances is presumed to be contracted for the benefit of the family.[a]

41. Mere knowledge will not make a member of an undivided family a party to an alienation so as to bar his right to recover in ejectment.[b]

42. When the alienation is for the common benefit, or where it has been made for the liquidation of a charge, &c., payable out of the common stock, the co-heirs are concluded by it; although a case may arise in which the remedy of the alienee may be against the alienor only.[c]

Duties of purchaser.

43. When a purchaser of immoveable property deals with a person having a qualified power of dealing with that property, it lies upon the purchaser to give some reasonable account of the need which actually existed was to alleged exist for the sale.[d]

44. In the case of a sale, when the dispute is with the vendee, and the money had not been

a 1 Madras Reports, 398; 11 Sutherland's Weekly Reporter, 446. It has recently been decided by the Privy Council that a father may sell family property to pay off his own debts which were not contracted for the benefit of the family but which his sons would be under a moral obligation to discharge. 1 Indian Appeals, 321; 15 Bengal Reports, 264; 2 Indian Law Reports, (Calcutta) 438.

b 2 Bengal Reports, 428.

c 1 Strange's Hindu Law, 200; 2 Ibid., 336—338. Colebrooke.

d 2 Madras Reports, 407. As to powers of manager, see 6 Moore's Indian Appeals, 423.

advanced to discharge a prior debt, positive proof must be adduced. When it had been so advanced, it is enough to show a *primâ facie* case by presumptive evidence that the charge existed, and that it was ascertained by inquiring that it was a burden on the property from which it was prudent to relieve the family, and that the advance was made in good faith for its discharge. When parceners are acting in collusion to defraud a purchaser by setting aside the alienation, the *onus* of disproving its validity would lie upon them.[a]

45. Where in the particular instance the charge is one that a prudent owner would make, the *bonâ fide* lender, is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred on it in the particular instance is the thing to be regarded. If a lender, before making a loan, makes enquiries and acts honestly, the real existence of an alleged sufficient and reasonably credited necessity, is not a condition precedent to the validity of his charge, and under such circumstances he is not bound to see to the application of the money.[b]

a 6 Madras Reports, 371. See Chap. VIII.

b 6 Moore's Indian Appeals, (*Hunooman Pershad's* Case,) 393, 423. *Secus* if the lender has been a party to the mismanagement. In one case it was held by the Full Bench of the High Court of the North West Provinces that where a father had sold ancestral property for immoral purposes that the sale was invalid according to Hindu Law, and was not even valid to the extent of the father's share. 4 Indian Jurist, 251.

46. Where a person alienated property in which he had merely a life-interest, it was held that the alienation was invalid as against the party entitled as reversioner.[a]

Alienation by widow.

47. The above *dicta* apply with greater force to alienations by Hindu widows of their husbands' estates—the widows' interest being a *restricted* estate of *inheritance*, with power of *exclusive* enjoyment.[b] Her estate is *absolute*, though her powers over it are *limited.*

48. An alienation by a widow for necessary purposes, *e.g.*, for religious, or charitable, or even worldly ones, is binding upon the reversioners without their consent.[c] The *Çraddha* of her deceased husband, the marriage of his daughter, the maintenance of his grandsons, and the payment of her husband's debts are legitimate grounds for alienation. What are necessary purposes, however, would always be a question of fact in each case.[d]

a 2 Madras Reports, 378.

b 3 Ibid., 116. See case of *Kasheenath Bysack* v. *Hurooboondery Dossee*, decided by Sir Hyde East, Chief Justice of Bengal (1819) and confirmed by the Privy Council, 2 Morley's Digest, 198 and Clarke's Reports (1834) 91.
8 Moore's Indian Appeals, 550.

c 1 Strange's Hindu Law, 246, 247; Colebrooke's Digest, Bk. V., Chap. VIII, § 399.

d In 8 Moore's Indian Appeals, 529, the Privy Council lay down the rules with regard to alienation by women. They have a larger power of disposition for religious purposes than worldly ones. An alienation too not otherwise legitimate may become so if made with consent of husband's kindred. It does not follow however from this if there are no kindred that the fetters upon alienation cease.

49. The restriction placed upon a widow's power of alienation of her husband's estate extends to all the property left by him, movable and immovable, ancestral and self-acquired. Her power of disposition of both is limited to certain purposes.[a]

50. An alienation by a widow, even for other than legitimate purposes, is however good for her life, and the reversioners are not entitled to dispute it during her life, unless their own interests are endangered thereby, *e.g.* as by causing waste.[b]

51. The widow of an undivided Hindu has no right to sell his property for payment of his debts even though it be self-acquired.[c]

52. Even if there are no reversionary heirs, the widow's power of alienation is still restricted. The Crown can then interfere to set aside the alienation.[d]

53. A widow has no right to alienate the *accumulations* of her husband's estate: they should be treated in the same way as the *corpus*. She would be allowed to dispose of the *income*.[e]

a 11 Moore's Indian Appeals, 487.

b 6 Ibid., 445. Leading Case, 1 Madras Reports, 206; 2 Ibid., 393, 3 Ibid., 116; 6 Bombay Reports, 270; 1 Indian Law Reports, (Bombay) 577.

c 1 Madras Reports, 374.

d 8 Moore's Indian Appeals, 550.

e 4 Bengal Reports, O. C., 40. See also 6 Ibid., 732; 7 Ibid., 93; and 15 Sutherland's Weekly Reporter, C. R., 63. Property purchased by a widow out of the savings of the estate will not be considered as forming part of the *corpus*, but will be at her disposal. 25 Weekly Reporter, 335. The same point was decided in the *Sivagunga* Case, 4 Indian Jurist, 111.

54. A widow cannot alienate when the reversionary heirs offer to supply her with the money she requires.[a]

55. A grant by a Hindu widow with the sanction and concurrence of the next reversioner is valid, and creates a title which cannot be impeached on the death of the widow by the person who, but for such grant, would be entitled as heir of her husband.[b]

Alienations by women generally.

56. The same restrictions with reference to ancestral estates are placed upon mothers and daughters during the lifetime of other heirs.

57. The restrictions placed upon alienations by women under the Bengal school are greater than under the *Mitâxarâ*.

58. The rules already stated with reference to the conduct of purchasers from males, having only a qualified interest in property, apply of course with greater force to purchasers from females.

Gifts.

59. There are gifts of several kinds under Hindu law forming different species of property—gift by a woman's affectionate kindred would form her *Soudayika*—a gift from a father or grandfather would be impartible, a gift by a stranger would be partible and so forth.

a Sham Churn's *Vyavastha Darpana*, 57. 1st ed.

b 4 Indian Jurist, 455.

60. By Hindu, as by English law, a man may make a gift of any of his property binding as against himself.[a]

61. The Hindu law recognizes the validity of a gift on condition. There is nothing against the principles of Hindu law in allowing a testator to give property whether by way of remainder, or by way of executory bequest, upon an event which was to happen, if at all, immediately upon the close of a life in being.[b]

62. A gift may also be made with conditions attached to its performance.

63. A *voluntary transfer* of property, if made *bonâ fide*, and not with the intention of defrauding creditors, is valid as against creditors.[c]

64. A father-in-law cannot by virtue of a special custom disinherit his son, and give all his property to his son-in-law.[d]

65. A donor, having made a gift upon a certain consideration, cannot set it aside afterwards on the ground that he erred as to the consideration.[e]

66. A gift of immovable property to a man by a woman living under his guardianship cannot be enforced as against her husband.[f]

a 1 Madras Reports, 393.
b Ibid., 403; 9 Moore's Indian Appeals, 135.
c 4 Madras Reports, 84. The Hindu and the English Law on the subject are discussed in this case.
d 1 Madras Reports, 51.
e Ibid., 393.
f 2 Ibid., 360.

67. A gift or any alienation made so as to leave the family destitute, or unable to defray necessary expenses, would be invalid in countries governed by the *Mitâxarâ.* Otherwise in Bengal.[a]

68. A gift by a minor is invalid. A gift by a leper is valid; and a lunatic may *take* by gift. A gift to an idol, or to a religious institution, would be valid.[b] So also a gift might be made in trust for a minor or a person otherwise incapable of possession.

69. A gift or other alienation may be always set aside on the ground of physical or moral incapacity in the person making it.[c]

70. To constitute a valid gift, there must be a giving either orally, or by writing, with the intention to pass the property in the thing given, accompanied by its *actual* delivery and acceptance in the donor's lifetime.[d]

71. If these requisites be fulfilled, a gift may be made in contemplation of death.[e]

72. A gift which is to take effect after the death of the donor, does not go to the heir of the donee,

a 1 Strange's Hindu Law, 18; 2 Ibid., 431 *et seq.* Colebrooke.

b 6 Sutherland's Weekly Reporter, 68; 7 Ibid., 5.

c 1 Strange's Hindu Law, 23.

d 6 Madras Reports, 270; 6 Sutherland's Weekly Reporter, 245. It has been held, however that the absence of *seisin* is no objection to the validity of a gift by a Hindu.

e Ibid. A *donatio mortis causa* has not the same signification here as it has in England. Per *Phear*, J., in 3 Bengal Reports, O. C., 113.

without express stipulation, if the latter dies before the former.[a]

73. To make a gift of land complete under the Hindu law there must either be possession, or receipt of rent by the donee. The grant need not be in writing.[b]

74. *Benami* transactions, *i.e.*, gifts and purchases in the names of others are valid under Hindu law.[c]

75. A gift which is against the provisions of Hindu law is invalid.

76. Besides ancestral and self-acquired property, there is another species of property called *Stridhana*, or, as the name imports, woman's property. It may consist of anything of value, such as land, jewels, &c. The word *Stridhana* under the *Mitâxarâ* is not a *technical* term, but only *descriptive*.[d] **Stridhana generally.**

77. Ordinarily what a woman derives by gift, earnings and inheritance constitutes *Stridhana*. A stricter rule according to generally received notions would be that *Stridhana* consists of what a woman may dispose of independently of her husband or of others.[e]

a Sham Churn's *Vyavastha Darpana*, 601, 1st ed.

b 5 Bombay Reports, O. C., 83; 6 Moore's Indian Appeals, 267. See also 12 Moore's Indian Appeals, 300, which refers however more to a sale of land.

c 6 Moore's Indian Appeals, 53.

d 1 Strange's Hindu Law, 26.

e *Dâya-bhâga*, Chap. IV, Secs. 1, 18. She may do this with her *Soudayika*, which see *post*

78. Gifts to a woman during marriage by a stranger would not be *Stridhana;* so also some of her earnings would not be hers absolutely; and with regard to what she inherits, it will be her *Stridhana* or not, according to the relationship of the person from whom she inherits.[a]

79. The gift must be made by her husband or some one of her near relatives: if from a stranger it is without reserve at his disposal.[b]

80. A gift by a son to his mother for maintenance forms her *Stridhana.* And a devise by a father to an unmarried daughter has also been held to be *Stridhana.*[c]

81. With regard to gifts, earnings and inheritance she would of course stand on a different footing, if she were unmarried: they would perhaps be less under her control than if she were married.

Stridhana according to the *Çastras.*

82. The following kinds of property have been classed as *Stridhana* according to the *Çastras.* Some of these have particular names.

i. Gift to a woman as to her husband in trust for her at the time of marriage, and on account of the marriage.

a 3 Madras Reports, 272.

b 1 Strange's Hindu Law, 26, 27.

c 5 Sutherland's Weekly Reporter, Miscellaneous Reports, 53. 11 Bengal Reports, 256.

ii. Her fee, a gift to her in the bridal procession upon the final ceremony, when the marriage is about to be consummated (*Çulka*).[a]

iii. Gift to her on her arrival at her husband's house.

iv. Gifts by her relations or by her husband, or his relations (gifts of affectionate kindred) before, at, or after marriage. (*Soudayika*).[b]

v. Gift to her by her husband to reconcile her to the supersession when he is about to take another wife. (*Adhivedanika*).

vi. Gift to a woman from the bridegroom on the marriage of her daughter.

vii. Gift to her by her husband by way of reward for performing well her business in the house.

viii. Special gifts to her at any time by any of her relations.

ix. The earnings of her industry.

a The term *Çulka* has various meanings according to different authors. It would seem to include besides the description under clause ii, the kinds of *Stridhana* coming under clauses i, vii, and x, as well. From being originally the fee or bribe, it has become the wife's dowry. It has also a particular mode of descent. See post Chapter on Inheritance. Mayne's Hindu Law, Sec. 566, 2nd ed.

b This is Mr. Mayne's definition of *Soudayika*. Hindu Law, Sec. 567, 2nd ed. This will include the *Stridhana* called *Auvâdheya Yautaka* and others, as also the savings therefrom. It must be admitted the texts descriptive of the kinds of *Stridhana* are rather vague. As to savings, see 19 Sutherland's Weekly Reporter (Privy Council), 292. 1 Indian Law Reports (Madras), 281.

x. Gift to a woman for sending or to induce her to send her husband to perform particular work.

xi. Property which a woman may have acquired by inheritance, purchase, finding, seizure or partition.

xii. The savings of her maintenance.[a]

Manu's definition.

83. The most comprehensive description however of the *Stridhana* of a married woman is from *Manu*. What was given before the nuptial fire (*adhagni*), what was given at the bridal procession (*adhavahanika*), what was given in token of love (*pritidatta*) and what was received from a mother, a brother or a father (*anvadhaya*,) are considered as the sixfold separate property of a married woman. This enumeration, according to the *Mitâxarâ* commenting on this passage, is intended not as a restriction of a greater number, but as a denial of a less.[b]

84. There is not much difference, *generally speaking*, between the *schools* as to the *kinds* of property which constitute a woman's *Stridhana*.

Vijianeçwara's definition.

85. According to the *Mitâxarâ* property which a woman acquires by *inheritance*, purchase, partition, seizure, or finding is woman's property. This is a commentary of *Vijianeçwara* upon the *Yâjñavalkya Smṛti* which runs thus: What was given to a woman

a 1 Strange's Hindu Law, 20, 32. *Mitâxarâ*, Chap. II, Sec. ix, § 2. 1 Digest Chap. IX, Sec. 1, 3rd ed.

b *Manu* Chap. IX, 194.

by the father, the mother, the husband, or a brother, or received by her at the nuptial fire, or presented to her on her husband's marriage to another wife, *as also any other* (*separate acquisition*) is denominated a woman's property.[a]

86. The subject of *Stridhana* is *vexata quæstio.* The above *Smṛti* with its commentary has been a fruitful source of discussion and has given rise to a variety of decisions on the subject. The moot question is whether property acquired by a woman by *inheritance* forms part of her *Stridhana*, some maintaining that it does, the generality however holding that it does not.

Stridhana vexata quæstio.

87. The following are some of the doctrines held by the different High Courts regarding property *inherited* by a woman.

Doctrines of High Courts on woman's inheritance.

i. With regard to Bengal, it may be premised generally that, the rights of women are more restricted than they are in Madras and Bombay. What the cause of this is, it is difficult to say. Whether it be the effect of Mahomedan conquest as some allege, or whether it be the comparative incompetence of women to confer spiritual benefits

Bengal.

a *Mitâxarâ* Chap. II, Sec. xi, §§ 2, 3. The *Mitâxarâ* is supported by the text of *Gautama:* An *owner* is by *inheritance*, purchase, partition, seizure or finding. The *Sanskrit* words are *Swami*, *Rictha*, *Craya*, *Sumvibhaga*, *Parigraha*, *Adhiyamaha*. Stokes's Hindu Law Books, 42. The *Sanskrit* for the words "*any other*" in the text is "*adya*" which, it is said, really means "*and the like*," and therefore does not mean *all* kinds of property indiscriminately.

on the deceased does not much matter. The fact however remains.

According to the *Dâya-bhâga*, the term *Stridhana* itself has a *technical* and *restricted* meaning, and is applicable only to such property over which a woman has *independent* control, thus differing from the *Mitâxarâ* which applies the term according to its *etymology* to woman's property in general. The peculiar property of a woman over which she has absolute control under the *Mitâxarâ* is called her *Soudayika.* There is the further division in Bengal of *Stridhana* into *Yautaka* and *Ayautaka:* the former being applied to the gifts of the bridegroom at the time of marriage the latter to what she obtains from other sources. In Bengal, too, there is a particular mode of descent prescribed for the property called *Yautaka*, different from that prescribed for *Ayautaka.* Whereas in Madras generally speaking, there is but one mode of descent for all woman's property.

In Bengal it is held even under the *Mitâxarâ* that no property movable or immovable *inherited* from a *male* by a woman *married, unmarried* or *widow* forms her *Stridhana. Stridhana* that has once devolved loses its character as such and is ever afterwards governed by the ordinary rules of inheritance. Thus property given to a woman on her marriage is *Stridhana*, and at her death passes to her daughter: upon the daughter's death it passes to the heir of the daughter like other property, and the brother of her mother would be

heir in preference to her own daughter, if she was a widow without issue.[a] This is also *Mitâxarâ* law.

Madras.

ii. In Madras the tendency is to follow the Bengal school and the tenor of the decisions is therefore in the same direction.

Accordingly it has been held that property inherited by a woman from her *mother*, or her *husband* is not *Stridhana;* and again that property inherited by a *mother* from her *son* was not of that description. So also in the recent *Sivagungah* case it was held by the High Court that property inherited by a *daughter* from her *father* did not vest in her as an *absolute* estate, nor was it *Stridhana.* Property so taken passed on the daughter's death to the next surviving heir of the last *male* holder. Daughters surviving would succeed as such heirs; and a daughter's son before a daughter's daughter. The daughter succeeded the widow in the *order* of inheritance; but the inheritance of the daughter was *not* to her *mother*, but to her *father.* The maiden succeeded in competition with the married; but the former could not by having issue continue

a *Dâya-bhâga*, xi, 1, § 57—59.
Ibid., xi, 2, § 30-31. Chap. II, Sec. iii, § 6.
Dayakrama Sangraha, W. H. Macnaghten, 38, 2nd ed. 14 Bengal Reports, 235, affirmed in appeal by the Privy Council, 6 Indian Appeals, 15. This may be considered the Leading Case on the subject. It is a case relating to the *Jains* in Bengal and is decided under the *Mitâxarâ*. In it, all the authorities have been elaborately reviewed by the Bengal High Court and the decisions of the Bombay High Court dissented from while those of Madras have been approved. The case was that of a *daughter inheriting* from her *father*.

her estate in her own line. The fact that a daughter inheriting her father's estate was the only daughter unmarried at her father's death, did not give such daughter an absolute instead of a qualified and limited estate. In this case it was held for that it was a settled rule of *all* the Courts (including Bombay) that the estate taken by the *widow*, the *mother* and the *grandmother* by inheritance from male members of their family reverted on their death to the next heir of the last male holder. And, finally, that the doctrine of the *Mitâxarâ* as to a woman's *inheritance* forming *Stridhana* had *not* descended as law to the present time.[a]

Bombay. iii. In Bombay the doctrine of the *Mitâxarâ* as to a woman's *inheritance* forming her *Stridhana* is upheld almost in its entirety. The definition of

a 2 Madras Reports, 402.
3 Ibid., 312.
6 Ibid., 310.
8 Ibid., 88.
4 Indian Appeals, 1.
4 Indian Jurist, 111. (*Sivagungah* Case). This decision goes far to settle the law so far as the Madras Presidency is concerned. The question of *Stridhana* generally under the *Mitâxarâ* was exhaustively handled by *Innes* and *Muthusami Iyer*, JJ. and the above conclusions were categorically laid down. The Madras Courts at one time however held differently. Vide Decisions of the late Sudr Adawlut (Decisions of 1850, 76, of 1856, 47, of 1858, 244.) See also 1 Strange's Hindu Law, 139, Strange's Manual, § 354. The change was first introduced by the Madras High Court in 1865. Vide 2 Madras Reports, 402. The Madras High Court decisions on the subject of *Stridhana* have been questioned by Messrs. West and Buhler, Digest, I Vol. 107, Appendix, 1st ed. Mr. Mayne however upholds them and dissents from the Bombay view.

Stridhana is very general. The *Mitâxarâ* it is said recognises only *one* class of *Stridhana* and includes in that class *all* property acquired by a woman by *inheritance*—the word *Stridhana* being taken in its etymological or widest sense. *Stridhana* there is divided into two kinds, *viz.*, that over which a woman would have *absolute* control and that in which she has only a limited and qualified estate, the latter being the case when the property is *immovable*, except in the case of the *daughter* and the *sister* who take *absolutely*. Accordingly it has been held that a *daughter* inheriting from her *father* takes the property as *Stridhana.* So also a *sister* inheriting to a *brother* by analogy to a daughter. Again property inherited by a *married* woman from her *father*, or a *widow* from her *husband* classes as *Stridhana* and descends accordingly. The *Vyavahara Mayukha* also it is said, considers property acquired by a woman by *inheritance* to be *Stridhana*, but classes *Stridhana* under two heads—*Stridhana* in a narrower sense, embracing particular species for which a peculiar mode of devolution is prescribed and *Stridhana* generally (including *Stridhana* acquired by inheritance) which descends in the same line as if the woman had been a male, that is, to her sons and the rest and this notwithstanding her having left daughters.[a]

a 1 Bombay Reports, 130.

Ibid., 209.

Ibid., 117.

2 Ibid., 10. In this case it was held that the property must be inherited from members of the woman's *own* family, but this is contro-

Privy Council.

88. The Privy Council uphold the respective Courts in their views of the *Stridhana* question.

verted by West, J. in 8 Bombay Reports, 266. As to a *widow's inheritance* forming her *Stridhana*, see however 4 Bombay Reports, O. C., 163.

4 Ibid., 150.

6 Ibid., A. C., 215.

8 Ibid., O. C., 244. The alleged mode of descent of the mother's estate to sons according to *Nilakantha* will not preclude the *possibility* of the descent of the estate to *daughters* in the absence of sons and other heirs so that the doctrine is not opposed to the *Mitâxarâ*, according to the Bombay interpretation.

10 Ibid., 403.

3 Indian Law Reports (Bombay) 171, 353, 369.

West and Buhler's Digest, I Vol., 107, Appendix, 1st ed.

Ibid., Bk. 2, Appendix.

The disputed text of *Vijianeçwara* has been discussed by Mr. Mayne in his treatise on Hindu Law and he dissents from the Bombay High Court as to its interpretation. The view which he submits is this: "*Vijianeçwara* includes under the term *Stridhana* property which a woman has acquired in any way whatever. The descent of that which she has derived from a male—that is, from a husband, father, or son—is treated of in the earlier sections of Chap. ii; that which she obtained otherwise is treated of in § 11. Its other quality, *viz.*, alienability, he appears nowhere to discuss." Mr. Mayne's opinion therefore is that the disputed text does not apply to *property inherited from a male* and is no authority for the position held by the Bombay High Court that *all* property *inherited* by a woman forms her *Stridhana*. Hindu Law, Sec. 524, 2nd ed. With regard to the descent of *Stridhana* to a woman's *sons*, &c., according to *Nilakantha*, as cited and translated by Mr. Justice West, (8 Bombay Reports, O. C., 260.) Mr. Mayne observes that the meaning of the passage in the *Vyavahara Mayukha* appears to be that "the mother's estate does not descend according to the rules applicable to *Stridhana* but is taken by such heirs being sons or otherwise, as would have taken it, if the accident of the falling to a woman had never occurred. Where therefore the property had come to the mother from a male it would return to the heirs of that male. This is precisely the law of the *Mitâxarâ* as I understand it." Mayne's Hindu Law, Sec. 530, 2nd ed. The passages as translated by Mr. Justice West runs thus: "It is clear that although there be daughters, the sons or other heirs still succeed to the mother's estate, as far

The most recent decision is that already referred to from Bengal in connection with the *Jain* sect. The doctrine of the Bombay High Court is upheld as being in accordance with the *Vyavahara Mayukha* which is a leading authority in that school.[a]

89. In that which constitutes woman's property, a distinction obtains of what has been given to the woman, whether it be immovable or movable by her father, mother or brothers between the period of her betrothal and that when she is taken to her husband's house (for form sake) on the completion of the marriage—being usually five days. Over such she has exclusive control without regard to her husband or heirs. This is called her *Soudayika* or gift by affectionate kindred, as above stated.[b] *Soudayika.*

90. *Katyayana's* definition of *Soudayika* is, that which is received by a married woman, or by a

as it is distinct from the part already described (as subject to the peculiar devolution under texts applicable to particular species of *Stridhana*)." Mr. W. H. Macnaghten however appears to have held views similar to Mr. *Justice West*, as to the descent of *Stridhana* not properly so called. W. H. Macnaghten's Hindu Law, 38, 2nd ed. According to Mr. Mayne woman's property taken in its *widest* sense falls under three heads: First, property over which she has absolute control: Secondly, property as to which her control is limited by her husband, but by him only: Thirdly, property which she can only deal with at all for limited purposes.

a 9 Moore's Indian Appeals, 610.
10 Ibid., 312.
11 Ibid., 487.
2 Indian Appeals, 126. The *Vyavahara Mayukha* however is nothing more than an elucidation of the *Mitâxarâ.*

b Strange's Manual, §§ 147, 165. *Smṛti Çandrikâ*, 122, 123, 1st ed.

maiden in the house of her husband, or of her father, from her brother, or from her parents. So also *Vyasa*. According to the *Smṛti Çandrikâ* the above passage shows that *Soudayika* is the same as the wealth called *Yautaka* (that is includes it) or the like received by a woman from her own parents, or persons connected with them, in the house of either her father, or her husband, from the time of her betrothment to the completion of the ceremony to be performed on the occasion of her entering her lord's house.[a]

Wife's ornaments.

91. Ornaments worn by the wife during her husband's lifetime and not distinctly given to her by her husband are not considered her property as long as he lives, but become so at his death if she survives him, and are afterwards inherited as *Stridhana*. So also ornaments worn with the husband's consent even if they have not been given to her.[b]

Ornaments of unmarried woman.

92. The ornaments of an *unmarried* female and other gifts to her by members of her family, as well as property inherited by her from female rela-

a *Smṛti Çandrikâ*, 122, 123, 1st ed. According to the *Smṛti Çandrikâ* the term *Yautaka* means property given *by any one* to the bride or bridegroom while seated together at a marriage or the like. *Smṛti Çandrikâ*, 138, 1st ed.

See also as to *Yautaka* and *Ayautaka*, and *Soudayika*, ante. Mr. Mayne gives a more general definition of *Soudayika*, see ante. The texts are conflicting on the subject of *Yautaka*. Mr. Mayne is of opinion that *Yautaka* are nuptial gifts, consisting chiefly of domestic utensils, &c., somewhat similar to the ornaments received by an English bride. Hindu Law, Sec. 575, 2nd ed.

b Elberling, 84; *Chintamani*, 260.

tions will be her *Stridhana*. The former descends to particular heirs.[a]

93. The different acquisitions included in *Stridhana* may for all practical purposes be included in gifts, or the like, from her husband or kindred before, during, or after her marriage. Gifts to a married woman from a stranger, that is from other persons than her husband and kindred, and *not* made at the time of her marriage, belong to the husband's estate and are considered as his property, and so are all her acquisitions by the practice of any mechanical art, as spinning, weaving, or the like; but what she acquires by her own exertions in a state of widowhood belongs of course to her own property.[b] *Stridhana* practically.

94. *Stridhana* that has once devolved loses its character as such and acquires the incidents of ordinary ancestral estate.[c] When *Stridhana* loses its incidents.

95. Generally speaking, a woman has absolute control over her *Stridhana* movable or immovable, with the exception perhaps of land given her by her husband.[d] A woman's control over *Stridhana*.

96. There are occasions however when the husband also may make use of it, as when the family

a *Mitâxarâ*, ii, Sec. xi, § 30. *Vyavahara Mayukha*, Chap. IV, Sec. x, § 33.

b Ibid., *Mitâxarâ*, Chap. II, Sec. 2. See also as to essentials of *Stridhana*. Mayne's Hindu Law, Sec. 665, 2nd ed.

c *Dâya-bhâga*, Chap. XI, Sec. ii, § 30. *Dayakrama Sangraha*, Chap. II, Sec. iii, § 6. W. H. Macnaghten, 38, 2nd ed.

d 2 Madras Reports, 405.

is in want when distress prevents the performance of an indispensable, particularly of a religious duty, or in sickness, imprisonment or even on account of the distress of a son nor is he obliged afterwards to account for it. The right however is only personal in the husband.[a]

97. According to *Katyayana* a woman's *Soudayika* even if immovable is alienable at will. Accordingly it has been held that, except in that kind of *Stridhana* called *Soudayika*, a woman has no independent power of disposal of her *Stridhana*.[b]

98. Generally speaking any gross abuse of her *Stridhana* by a woman will be controllable by her father while single, by her husband during coverture, and by her guardians after his death, such interference being itself subject to revision by the judicial power.[c]

a 1 Strange's Hindu Law, 27.
2 Ibid., 22, 23, Colebrooke citing *Mitâxarâ*, Chap. XI, Sec. ix, §§ 31, *et seq.* W. H. Macnaghten's Hindu Law, 40; 2 Madras Reports, 360; 1 Ibid., 85, citing Sutherland. Under Roman Law the husband had entire management of the wife's *dos* (dowry) as well as the use of it during marriage. He could do what he pleased with the movables, but he could not alienate or encumber immovables, even with the consent of his wife.

b Burnell's *Dâya-Vibhâga*, 41, 42.
4 Indian Jurist, 111. *Sivagungah* Case.

c 1 Strange's Hindu Law, 28.
2 Madras Reports, 360.
The following are some of the principal authorities on the question of *Stridhana*: *Manu*, 9, 194; *Vyavahara Mayukha*, Chap. IV, Sec. viii, §§ 10, 14; Burnell's *Dâya-Vibhâga*, 40 *et seq.*; 1 Norton's Leading Cases, Appendix, 8, 13; 1 Strange's Hindu Law, 26, 32, 49, 52, 137, 140, 246, 250; Strange's Manual, §§ 145, 310, 326, 343, 364, (366—368); Colebrooke's Digest, Vol. II; West and Bühler, Vol. II (67—112), Appendix; *Mitâxarâ*, Chap. II, Sec. xi, §§ 458, 466; *Smṛti Çandrikâ*, Chap. IX.

99. The same restrictions that apply to the alienation of ordinary ancestral property apply also to Zemindaries and other impartible estates. "A Zemindar," it is said "is in the position of a manager of family property and no alienation of his estate will be valid as against his successor, except for purposes of necessity.[a] **Alienation of Zemindaries.**

100. In an early case in the Madras High Court it was held that "a Zemindar has an estate analogous to an estate-tail as it originally stood upon the statute *De Donis*. He is the owner but can neither encumber nor alienate beyond the period of his own life. If he had sold, the sale would be inoperative beyond his own life, and would amount merely to an alienation of his life interest."[b]

101. Leases of a Zemindary *prejudicial* to the interests of the successor are not binding upon him. It has also been held that a Zemindar could not charge a perpetual annuity upon the income of the Zemindary.[c]

102. According to Regulation XXV of 1802, Section 8, alienations by Zemindars, Mirasidars and **Regulation XXV of 1802.**

a 1 Madras Reports, 349.
2 Ibid., 128.
8 Ibid., 157, 189.

b Per *Holloway, J.*, 2 Madras Reports, 128. The Statute (13th Ed. I. C. 1, A. D. 1295.) *De Donis conditionalibus* (conditional alienations) called *also the Statute of Westminster the Second* was, through the influence of the Barons, passed in the reign of Edward I, to prevent the alienation of estates-tail, so that they might revert to the donor, or his heirs, if the issue of the tenant should fail.

c 4 Madras Reports, 471.
1 Ibid., 455.

other landed proprietors shall be invalid, unless such alienations shall have been regularly registered at the office of the Collector, and unless the public assessment shall have been previously fixed and determined. Nor shall such alienation exempt a Zemindar from payment of any part of the public land tax assessed on the entire Zemindary previously, but the entire Zemindary shall continue to be answerable for the total land tax in the same manner as if no such transaction had occurred.[a]

Title to property how decided.

103. Questions of title to property amongst Hindus are now decided by English law, and the Hindu Law of Limitation has been supplanted by Act XV of 1877, the Indian Statute of Limitation.[b]

a In the earlier Reports of the Madras High Court (1 Madras Reports, 111) it was held under this Regulation that, even leases of land made by a Zemindar, or other landed proprietor without confirming to its terms, would not be binding upon his successor. The general effect of the Regulation was much discussed in 3 Madras Reports, 5. It is now, however, held that the Regulation was passed mainly for the protection of the interests of Government. In 8 Moore's Indian Appeals, 327, *Lord Kingsdown* said, "The language of the Regulation would seem to apply to questions between the Zemindar and the Government, and to have been framed with a view of preventing a severance of the Zemindary without public notice to the Government." See also 4 Madras Reports, 396, 463. The Regulation, however, does not sanction any alienation opposed to the principles of Hindu Law.

b In applying the English law to Hindu estates it has been the practice to adopt the nomenclature of the English law of real property to express the *quantum* of an estate of a Hindu owner. A Zemindar for instance has been compared to the owner of an estate-tail. The comparison is hardly correct. For the owner of an estate-tail has an *absolute* estate, except when it is not in possession, but expectant upon the determination of prior estates, in which case alone a *partial* restraint upon alienation exists. This practice however is on the decline as the Privy Council has expressed its dissent on the subject.

CHAPTER III.

MARRIAGE.

104. THE time when a girl should be given in marriage (betrothment) is before puberty, even before the age of eight years.[a] This rule, however, is not observed by *Çudras:* among *Brahmans,* however, it is essential that the marriage ceremony be performed before the age of puberty. Time of marriage.

105. Girls are, however, given in marriage at the age of two, and upwards, till they attain their maturity. A *Brahman* girl attaining maturity without having contracted marriage, forfeits her caste.[b]

106. The three superior classes, viz., the *Brahmans* or the sacerdotal order, the *Xatriyas* or the military tribe, and the *Vaiçyas* or the mercantile body, may not contract marriage until they have completed the stage of studentship, the opening of which period is marked by performance of the *Oopanayana,* or investiture with the sacred thread, and the close by a ceremony termed *Samavurthana.* For the *Çudras,* or servile class, who have no stage of studentship, there is no limitation as to the time for marriage.[c]

a 1 Strange's Hindu Law, p. 36.

b Strange's Manual, § 19.
Ibid., § 20.

c Ibid., § 24.

Selection of husband.

107. If a husband be not selected for a girl for three years after she has attained her eighth year, she may select one for herself.[a]

108. The right of selection vests first in the girl's father, and, at his death, in her paternal grandfather, brother, kinsman, remote relations *(saculya)*, and mother in succession.[b]

109. Where the father is alive and is the guardian of the girl, his consent must be obtained.[c]

110. A divided brother has not during the lifetime of his brother's widow an exclusive right to betroth his deceased brother's infant daughters to whom he will without consulting the mother. In a divided family the widow is legally the guardian of her daughters and the proprietor of her husband's estate.[d]

Relation of parties before and after betrothment.

111. Previous, and up to betrothment, the affair rests legally in promise, which may be broken subject to consequences as the breach can or cannot be justified. What is termed the betrothal is really the first stage in the marriage. A suit will not lie for specific performance of *a promise of marriage*, but damages may be obtained.[e]

a Strange's Manual, § 24.

b 2 Strange's Hindu Law, 28, Colebrooke citing *Mitâxarâ.*

c 1 Borrodaile's Reports, 14.

d 4 Madras Reports, 344.

e 2 Strange's Hindu Law, p. 28, Colebrooke citing *Mitâxarâ.*
7 Bombay Reports, O. C., 122. 1 Indian Law Reports, (Calcutta) 74. Under Roman law a mutual promise to marry (*sponsalia* espousals) could not be enforced.

112. Wherever, from the existence of a legal impediment or the death of the girl, the marriage has been prevented from taking place, the bridal presents are returnable, the bridegroom, in the latter case, paying the expenses incurred on both sides. If the breach be on the girl's side without discovery of legal impediment, her family are to bear the expenses.[a]

113. According to *Manu*, a woman should not marry a man of a caste below her, though a man may marry in his own caste or in an inferior one. A *Çudra* may not marry in a caste higher than his own.[b]

114. After betrothment, the girl remains under the care of her family till her maturity admits of her husband claiming her, of which it is the province of the mother to give notice.[c]

The essence and principal ceremony of marriage.

115. The essence of the rite of marriage consists in the consent of the parties, that is, of the man on the one hand, and on the other of the father or whoever else gives away the bride.[d]

a 2 Strange's Hindu Law, p. 38, *Mitâxarâ*, Chap. II, Sec. xi, § 29.
Strange's Manual, § 31.

b *Manu*, Chap. III, cl. 12, et seq.; Ibid., Chap. III, Sec. 13; Chap. IX, Sec. 157. *Mitâxarâ*, Chap. I, Sec. viii, § 7, and Sec. xi, cl. 2, and note. The texts in *Manu* on the subject of mixed marriages are conflicting. According to Mr. Mayne, mixed marriages at one time prevailed. Hindu Law, Secs. 74, 75, 2nd ed.

c 1 Strange's Hindu Law, p. 37.

d 2 Ibid., p. 44.

116. The ceremony most essential to marriage is that of the bride and bridegroom walking seven steps *(sapthapathi)* hand in hand during a particular recital. The contract is perfected upon their arriving at the seventh step, and may be enforced by the husband on completion of the time.[a]

117. The question whether there has been a marriage ceremonially complete must be decided in each case with reference to the question, what formalities are customary among the parties concerned. The omission of the usual formalities will raise a presumption that there was not a valid marriage.[b]

Death of husband before consummation entails widowhood.

118. If the husband die before consummation, the girl is in every respect considered a widow.[c]

Effect of loss of caste.

119. When either party incurs forfeiture of caste, intercourse between them ceases, and should the loss of caste be on the side of the woman, and she be sonless, she is accounted as dead, and funeral rites are performed for her. If she have a son, he is bound to maintain her,. and in this way, under such circumstances, her existence is recognised notwithstanding her loss of caste.[d]

a 1 Strange's Hindu Law, p. 37.

b Cunningham's Digest, § 79.

c 2 Ibid., 32, 33, Ellis, W. H. Macnaghten's Hindu Law, 2nd ed., 58. As to re-marriage of widows, see Chap. I, ante: also Act XV of 1856, relating to the re-marriage of widows, minors, as well as those of full age, and which also gives particulars as to what constitutes a valid re-marriage.

d Strange's Manual, § 32.

120. The parties must be of the same class, but of distinct and unconnected families: this precept, however, is not binding upon *Çudras.*[a]

Parties to be of the same class.

121. The general law, however, applicable to all the classes or tribes, does not seem opposed to marriage between individuals of different sects or divisions of the same class or tribe, and even as regards the marriage between individuals of a different class or tribe, the law appears to be no more than directory.[b]

122. In all cases where there has been a marriage *in fact*, the Court will declare the marriage to be valid.[c]

There must be marriage in fact.

123. The relations with whom it is prohibited to contract matrimony are thus enumerated by *Manu:* " She who is not descended from his *paternal* or *maternal* ancestors within the sixth degree, and who is not *known by her family name to be* of the same primitive stock with his *father* or *mother*, is eligible by a twice-born man for nuptials and holy union." This rule may or may not be observed by

Prohibited degrees of relationship for marriage.

a 1 Strange's Hindu Law, 39, 40.

1 Madras Reports, 478. The selection of persons to be married is limited by two rules: first, that they must be chosen outside the family; secondly, that they must be chosen inside the caste. Mayne's Hindu Law, Sec. 81, 2nd ed.

b 1 Madras Reports, 478. The prohibition against marriages between persons of different castes is comparatively modern. Mayne's Hindu Law, Sec. 82, 2nd ed.

c 13 Moore's Indian Appeals, 58.

Çudras. It is to a great extent practically disregarded by *Brahmans.*[a]

124. Upon the principle that an adopted son identifies to all intents and purposes with a natural one, a marriage by such a son with the daughter of him by whom he has been adopted would be incompetent.[b]

125. Various texts of *Manu* discountenance the marriage of a younger brother or sister before the elder. This too is practically disregarded at the present day.[c]

Marriage not a contract.

126. By the Hindu law, a marriage is not a contract: it seems therefore that a Hindu idiot's marriage would be valid. A lunatic's marriage has been held valid.[d]

Different kinds of marriage.

127. There are eight different forms of marriage:—the *Brahma, Daiva, Arsha* (or *Rishis*), a survival from the *Asura, Prajapatya* (or *Caya*), *Asura, Gandharva, Rakshasa,* and *Piçacha.* Of these, the four first, being approved ones, are proper for the *Brahman:* the *Gandharva* and *Rakshasa* are

a W. H. Macnaghten's Hindu Law, 2nd ed., 61. 1 Strange's Hindu Law, 41. Strange's Manual, § 47.

b Ibid.

c Ibid.

d 1 Madras Reports, 214, Note, citing *Dabychurn Mitter* v. *Radachurn Mitter*, 2 Morley's Digest, 99. West and Buhler, 274. See, however, W. H. Macnaghten's Hindu Law, 2nd ed., 57, where it is said that among the Hindu marriage is not merely a *civil contract* but a *sacrament*. *Betrothal* however is a contract and may be broken.

permitted to the *Xatriya* or military class, and the *Asura* to the mercantile and servile ones—the *Piçacha*, being prohibited to all, is universally reprobated.[a]

128. Of these the *Brahma* and *Asura* appear to be the forms most observed in Southern India, the former being disinterested; while the characteristic of the latter is the payment of money by the bridegroom to those who give the bride away.[b]

129. The *Asura* form is peculiar to *Vaiçyas* and *Çudras*. Though each class has its peculiar form of marriage, there is nothing to bind it to the species appropriate to it. A *Brahman* may contract an *Asura* marriage and a *Çudra* a *Brahman* one.[c]

Women belong to *Gotras* of their husbands.

130. *Brahmans* are divided into *Gotras*, the head of each *Gotra* being some particular sage. Most of the *Xatriyas* and all the *Vaiçyas* follow the *Gotras* of their *Purohitas*, or family priests. The descent in these *Gotras* is in the male line exclusively,

a 1 Strange's Hindu Law, 42, 43. A wife is called "Patni" which implies her capability of performing religious ceremonies in conjunction with her husband during his lifetime. See *Mitâxarâ*, Chap. II, Sec. i, § 5. According to the *Smrti Çandrikâ*, however, the term is applied only to a wife married in one of the approved forms.

b 1 Strange's Hindu Law, 42, 43. According to Mr. Mayne the gift in the *Asura* form of marriage is the origin of dowry. In the *Brahma*, *Daiva*, and *Prajapatya* forms the parents received no equivalent for the girl. For an interesting account of Marriage generally, see Mayne's Hindu Law, Chap. IV, 2nd ed.

c Strange's Manual, § 26. Madras Sudr. Decisions (1859), 44; 2 Borrodaile's Reports, 198.

and females after marriage are transferred to the *Gòtras* of their husbands.[a]

Rights and duties of husband and wife.

131. The union once effected, involves reciprocal rights and obligations of a personal nature as between husband and wife. It involves also special rights of property, and the right of supersession.[b]

132. The right of inheritance as between husband and wife is in a great degree reciprocal; the latter succeeding as heir to the property of the husband dying a divided member of a Hindu family, and leaving no male issue.[c]

Right to maintenance of widow and wife.

133. A Hindu widow's title to maintenance as well as also to inheritance on her husband's death depends upon her preserving her chastity.[d]

134. A Hindu wife leaving her husband for a justifying cause is entitled to maintenance; otherwise if there be none. The husband's marrying a second wife is not such justifying cause.[e]

135. If a Hindu husband marries a second wife, and his first wife thereupon leaves him, the first

a Strange's Manual, § 44.

b 1 Strange's Hindu Law, 44. The position of the Hindu wife is similar to that of the wife under Roman Law when the *conventio in manum* prevailed by which the woman and her property were placed entirely under the power of her husband. In later times this form of marriage was abolished and the wife could act independently of her husband.

c Ibid.
2 Madras Reports, 117, citing *Mitâxarâ*, Chap. II, Sec. i, § 39. See further, Chap. VI, *post*.

d 1 Strange's Hindu Law, 45.

e 1 Madras Reports, 375.

wife has no implied authority to borrow money for her support.[a]

Wife presumed to be husband's agent for contracting debts.

136. In the case of husband and wife living together, the presumption is that the wife is the husband's agent for contracting debts for the necessities of the family. But by Hindu law, perhaps this presumption is not so strong as it is by English law.[b]

Grounds of separation between husband and wife.

137. Infidelity in the husband or the wife: confirmed barrenness in the woman and corporal imbecility in the man: and loathsome or incurable disease in either, or production of only daughters, are some of the causes which authorize a separation or a supersession but not a divorce in the English sense of the term, except in the case of infidelity in the wife, which, it is said, "puts an end to the marriage." The absence of these causes will not however, invalidate a second marriage.[c]

138. Infidelity in the woman except in certain of the lowest classes, occasions forfeiture of caste, and therefore puts an end to the marriage: so also does conversion to a new faith of either the man or the woman. Act XXVI of 1866 provides for the dissolution of marriage of Christian Converts.

a 1 Madras Reports, 375.

b Ibid.

c 1 Strange's Hindu Law, 47. See Reporter's Note to; 1 Madras Reports, 374; 2 Ibid., 337; Strange's Manual, § 35.

139. The prohibition against a plurality of wives, save under certain circumstances, is merely directory and not imperative.[a]

140. A wife superseded but not divorced, must be provided for, she residing in the house of her husband. And if she live apart from him, it is her duty to seek protection from his relations; and failing them, from her own.[b]

141. The first wife's assent supplies the want of a justifiable cause for a second marriage, she being reconciled to her lot by a suitable settlement, which, according to Colebrooke, with her previous *Stridhana*, should be of a value equivalent to the expenses of the second marriage.[c]

Status of wives.

142. Where a plurality of wives exists, the one first married not having been suspended for any fault, takes precedence. She also succeeds eventually to her husband as heir, maintaining the others who inherit in their turn on her death, or even during her life in the event of her re-marriage, &c.[d]

143. An innocent wife abandoned without justifying cause does not lose her *status*, nor any of her rights to her husband's property.

a 1 Madras Reports, 375. Practically a Hindu may marry as many wives as he pleases, without his wife's consent, or any justifying cause.

b 1 Strange's Hindu Law, pp. 54, 55.

c Ibid., p. 53.

d Ibid., 56, 136, 137. Degradation, as a disqualification for inheritance, is removed by Act XXI of 1850.

144. The right of divorce by Hindu law is not competent either to the husband or to the wife, unless by custom, in contradistinction to the *Çastras*. It is competent to both among some of the lowest castes and the women may marry again. Such marriage is called *Natra* in Guzerat and *Pat* by the *Mahrattas* and is common in Bombay. This custom, however, in one case was declared invalid by the High Court of Bombay. The custom of divorce and re-marriage also prevails in Southern India.[a] **Right of divorce.**

145. Adultery is not a sufficient cause for the wife to desert her husband, and there are not many predicaments in which such an act on her part is justifiable. Insanity, impotence, and degradation might perhaps be considered justifying causes.[b] **Adultery and its effects.**

146. A woman divorced for adultery may in some cases claim a bare subsistence or what is called a *starving maintenance;* but a woman divorced for adultery who has continued in adultery during her husband's life, and in unchastity after his death, is not entitled even to such subsistence.[c]

147. When the adultery has been condoned, a Hindoo wife or widow may recover maintenance, or

a 1 Strange's Hindu Law, p. 52; 2 Bombay Reports, 125. The custom set up was that the re-marriage takes place *without the consent of the husband.* In other cases however both divorce and re-marriage have been upheld in Bombay. See Borrodaile's Reports, *passim.* As to divorce by custom, see 3 Indian Law Reports (Calcutta), 305.

b W. H. Macnaghten's Hindu Law, 2nd ed., 61, 62.

c 2 Madras Reports, 337.
1 Ibid., 372; 8 Ibid.

may inherit if she has inherited, her estate not being forfeited by subsequent acts of unchastity.[a]

Punishment of adultery.

148. Adultery being regarded as a criminal offence by the Hindu law and punishable as such, the adulterer would not be liable to an action of damages at the instance of the husband.[b] It is said the Hindu law does not grant discretionary damages. From the authorities this seems doubtful. The adulterer of course would be liable now under the Penal Code, but there seems no reason why a suit may not be brought by a Hindu husband for damages against the adulterer.

149. Adultery, though a criminal offence, is nevertheless expiable under Hindu law, if the parties are of the same caste. *Manu* gives the penances to be performed for adultery.[c]

Çudras may marry concubines.

150. A Hindu of a caste governed by the *Çastras* may contract a valid marriage with the daughter of a bastard, whilst the Hindu, unlike the English law, recognizes a bastard's relation to his father and family.[d]

151. Among the lower classes of *Çudras*, marriage with women who have lived in concubinage is allowed.[e]

a 1 Madras Reports, 372; 13 Bengal Reports, 1.

b 2 Strange's Hindu Law, 40—44, Colebrooke and Ellis.

c 9 *Manu*, 178, 179.

d 1 Madras Reports, 478. This of course is applicable only to *Çudras*. See however 9 Sutherland's Weekly Reporter, 552 and 1 Indian Law Reports (Calcutta), 1, where it is held that such marriage must have the authority of custom.

e Strange's Manual, § 40.

152. Though the Hindu law regards marriage with an eye of favor, it by no means discountenances illegitimacy. Independently of special usage or custom, it does not make illegitimacy an absolute disqualification for caste, so as to effect in the relations of life not only the bastard, but also his legitimate children.[a] Status and rights of illegitimate children.

153. By birth, and without any form of legitimation, bastards of the three twice-born classes are now recognized as members of their fathers' family and have a right to maintenance. So also the offspring of a marriage of a man of one of the above classes with a woman of an inferior class.[b]

154. In the case of *Çudras*, the law has been and still is that, bastards succeed their fathers by right of inheritance. And the illegitimate son of a *Çudra* is not an outcaste.[c]

155. The illegitimate son of a *Çudra* by a concubine, not being a female slave, is entitled to maintenance, that is, where he does not possess the inheritance.[d]

156. It has been held, however, that the illegitimate son of one of the mixed classes, between the second and third of the regenerate classes, has no title to inherit by the ordinary rules of Hindu law,

a 1 Madras Reports, 478.
b Ibid.
Cunningham's Digest, § 74.
c 1 Strange's Hindu Law, 69, 132; 1 Madras Reports, 478, and the authorities there cited.
d 2 Madras Reports, 293. See *post*, Chap. VI.

and the circumstance that the father was illegitimate does not alter the law.[a]

Act XV of 1856.

157. Act XV of 1856 not only permits the re-marriage of widows, but declares their issue by such re-marriage to be legitimate. It however deprives them afterwards of all right to their deceased husband's property.[b]

158. A suit for restitution of conjugal rights will lie to compel a Hindu wife to return to her husband and live with him. A suit however will not lie by a husband to recover possession of the person of his wife. In a suit for restitution of right, the wife may be imprisoned, or her property attached.[c]

CHAPTER IV.

GUARDIANSHIP AND MINORITY.

Guardianship regulated by statute.

159. Little or nothing is to be found on the subject of guardianship in works on Hindu law. The matter is principally regulated by statute.[d]

Limit of minority.

160. AGREEABLY to the Hindu law as current in the Benares school, minority is held to last until

a 2 Madras Reports, 369; citing 7 Moore's Indian Appeals, 18. As to the mixed classes, see *Manu*, Chap. IX.

b According to Mr. Mayne the prohibition against second marriages of women either after divorce, or upon widowhood, has no foundation either in early Hindu Law or custom. Hindu Law, Sec. 86, 2nd ed.

c 6 Sutherland's Weekly Reporter, 105; 14 Bengal Reports, 298. Act X of 1877, Sec. 260.

d Mayne's Hindu Law, Sec. 189, 2nd ed.

after the expiration of sixteen years of age; and according to the doctrine of Bengal, the end of fifteen years is the limit to minority.[a] These periods, however, have been extended by Act IX of 1875 (the Indian Majority Act) to *eighteen* years.

Effect of Majority Act.

161. Nothing in the Majority Act affects

(*a*) the capacity of any person to act in the following matters, namely, Marriage, Dower, Divorce and Adoption.

(*b*) the religion or religious rites and usages of any class of Her Majesty's subjects in India, or

(*c*) the capacity of any person who before this Act came into force attained majority under the law applicable to him.

Regulation V of 1804, and other Regulations relating to minors.

162. Under Regulation V of 1804, for constituting a Court of Wards, the period of minority is extended by Act IX of 1875, to twenty-one years *in the case of those under its care*, or of those for whom or whose property a guardian has been appointed by a Court of Justice.

163. Regulation V of 1804 contains various provisions relating to the appointment of guardians under the Court of Wards. Amongst others, that female guardians are to be appointed for females and male guardians for males, and that in the case

a W. H. Macnaghten's Hindu Law, 2nd ed., 103, 291.
2 Strange, 76, Colebrooke.

of males, the female relations are not to have charge of them after they have attained the age of seven, at which time the guardians are to appoint proper persons to educate them.[a]

164. Regulation X of 1831 extends portions of Regulation V of 1804, to estates not subject to the Court of Wards, by which the District Court, on the report of the Collector, may appoint a guardian to a person to whom property descends by inheritance, and who is disqualified by minority, sex, or natural infirmity for its management. Such appointment may be sanctioned or annulled by the High Court.

165. Acts XXVI of 1854, XXI of 1855 and XIV of 1858, relate to the education and marriage of minors. Act IX of 1861 refers to the mode of preferring claims to the custody and guardianship of minors. Act XV of 1856 contains provisions as to the guardianship of the children of a Hindu widow on her re-marriage. Act XIII of 1874 relates to guardian and ward.[b]

Right of guardian absolute.

166. The right of the guardian to the possession of the infant is an absolute right of which he can-

a See Act XXI of 1855 as to the education of male wards and the marriage of minors without leave of the Court.

b The corresponding Bengal Regulations are XXVI of 1793, II of 1803, VI of 1822, XL of 1858, V of 1870; Act XX of 1864 is a Bombay Regulation and is similar to Act XL of 1858, (Bengal Code) which extends the provisions of the previous enactments. The effect of this last Act was considered in 4 Indian Law Reports (Calcutta), 929.

not be deprived, even by the desire of the minor himself, except upon sufficient grounds.[a]

167. The natural guardians of a minor, (male or female,) are first, the father; then the mother and elder brother; in their absence, the paternal male kindred; and failing such relatives, the office devolves on the maternal kinsmen, according to their degree of proximity.[b] **Guardians of minor.**

168. The natural guardian of an illegitimate child is its mother.[c]

169. A father is not deprived of his right to the custody of his children by reason of his conversion to Christianity.[d]

170. As under the Hindu dynasties, the sovereign was the legal and supreme guardian of all minors, so also now the ruling power, acting through

a Mayne's Hindu Law, Sec. 190, 2nd ed.

b W. H. Macnaghten's Hindu Law, 2nd ed., 103, 104.

2 Strange's Hindu Law, 74, Colebrooke.

A converse case arises where a son changes his faith, and the question is as to who should be the guardian. It is now held that the age of the son should be considered and not his intelligence, and, if under age, the father is the custodian. This point was first decided by *Sir Erskine Perry*, late Chief Justice of Bombay and followed by the other Courts. See Perry's Oriental Cases, 103.

c Madras Sudr. Decisions, 1860, 154.

d 5 Sutherland's Weekly Reporter, 235; Weekly Reporter for 1864, 56.

the Courts, may appoint a guardian in lieu of any other guardian where necessary.[a]

Right of mother to guardianship.

171. In an undivided family governed by *Mitâxarâ* law, the management of the whole property, including the minor's share, would necessarily be vested in the nearest male and not in the mother. It would be otherwise where the family was divided. But this would not interfere with her right to the custody of the child itself.[b]

172. A mother loses her right by a second marriage and a father loses his right by giving his son in adoption. And of course any guardian however appointed may be removed for proper cause.[c]

173. In Bengal it has been held that according to the law of *Mithila*, the mother is entitled to the guardianship of a minor son in preference to the father.[d]

174. Where a mother, which of course implies a step-mother also, is both manager and guardian of the minor and his property, she as manager, is necessarily subject to the control of her husband's

a 1 Strange's Hindu Law, 71.
2 Ibid., 74, 75, Colebrooke.
W. H. Macnaghten's Hindu Law, 2nd ed., 104, 105. The pre-supposition to the exercise by the state acting through the Courts of the right to appoint a guardian is that there shall be no guardian existing by the provision of the law itself, see 7 Madras Reports, 179.

b Mayne's Hindu Law, Sec. 189, 2nd ed.

c Ibid.

d 5 Indian Law Reports (Calcutta), 43.

relations: and with respect to the minor's person likewise, there are some acts to which she is incompetent, such as the performance of the several initiatory rites, the management of which vests with the paternal kindred.[a]

175. A step-mother is not to be preferred to a paternal grandmother as guardian of a minor step-son, since relationship subsists between the two latter, which does not with regard to the step-mother and step-son. She is preferable however to a paternal uncle, or other kinsman.[b]

176. The adoptive mother of a boy, and *à fortiori* the adoptive father, has a claim to be guardian preferable to that of the boy's natural father.[c]

Appointment of guardian by Will.

177. It has been said that a testamentary appointment of a guardian is not noticed in Hindu law; but such an appointment will now be recognized by the Courts, since Hindu wills are held to be valid. Further, such an appointment has been sanctioned by special enactment.[d]

a W. H. Macnaghten's Hindu Law, 2nd ed., 103.

b 7 Sutherland's Weekly Reporter, 321.
1 Norton's Leading cases, 118.

c Cunningham's Digest, § 44, citing Regular Appeal 18 of 1876 (Madras). 3 Indian Law Reports (Bombay), 1.

d 2 Strange, 73, Colebrooke.
Madras Regulation V of 1804, Sec. 19, cl. 5. A testamentary guardian however, does not come within the scope of the Regulations and Acts prior to Act IX of 1661 and he cannot apply to the District Court for permission to remove minors from the custody of their mother. See 8 Madras Reports, 94. Under Roman law both *tutors* and *curators* were appointed to a minor. The former had charge of the person as well as the property of the pupil: the latter administered the estate of a minor who had reached full age, with his consent, or of a person of full age who could not act for himself.

Liability of minor.

178. A minor, so long as his minority lasts, is not liable for the debts of him whose property he has inherited. He will only be liable on coming of age. Subject to this condition, a minor must not only pay the debts above specified, but also all necessary debts contracted on his account during his minority. While his liability for the former will depend upon his inheriting the assets of the deceased, his liability for the latter will be the same, whether he inherits the assets or not.[a]

179. Colebrooke, says heirs succeed to the obligations of ancestors without any reference to the adequacy of the property, and the rights of inheritance must be relinquished when its obligation are repudiated.

Minor may be consulted as to appointment of guardian.

180. A minor legally can have no will, though if of a competent understanding, the concurrence of a minor as to the appointment of a guardian should not be disregarded. A minor may appoint a person to perform his own *Çraddhas*, as well as those of his ancestors.[b]

Powers of guardian.

181. The power of the manager of an infant heir to charge an estate not his own, is, under Hindu Law, a limited and qualified power. It can only be exercised rightly in a case of need, or for the benefit of the estate. It is the duty of guardians scrupulously

a W. H. Macnaghten's Hindu law, 2nd ed., 105.
2 Strange's Hindu Law, 279, Colebrooke; 3 Sutherland's Weekly Reporter, 10, 137; 13 Ibid., 166.

b Sutherland's Synopsis, Note viii.
1 Strange's Hindu Law, 72.

to regard the interest of minors in dealing with their estates, and the Court will, when necessary, enforce the performance of this duty.[a]

182. Minors are under the protection of the law favored in all things which are for their benefit, and not prejudiced by anything to their disadvantage. A minor, however, may be arrested in execution of a decree.[b] Minors protected by law.

183. All acts of the guardian of a Hindu infant which are such as the infant might, if of age, reasonably and prudently do for himself, must be upheld when done for him by his guardian.[c]

184. A minor may sue through his legal guardian to establish his rights; but where the legal guardian himself invades the minor's right, any friend of the minor may sue on his behalf. The consent of the minor to the institution of a suit on his behalf is unnecessary. In the same way, a minor may defend a suit as well as sue. An idiot or lunatic, too, may sue, or be sued, through a guardian, manager, or *prochein ami.* Guardians *ad litem* should always be appointed by the Court in which Power of minor to sue, &c.

a 2 Madras Reports, 47.
3 Bengal Reports, A. C., 54; 4 Indian Law Reports (Calcutta), 76.
6 Moore's Indian Appeal, 393.
14 Ibid., 393.

b W. H. Macnaghten's Hindu Law, 2nd ed., 105, citing Colebrooke on Obligations and Contracts.
2 Madras Reports, 47.
17 Sutherland's Weekly Reporter, Civil Rulings, 374.

c 1 Strange's Hindu Law, 203.
2 Madras Reports, 47.

the litigation is pending and the minor will then be bound by the result.[a]

Unmarried females.

185. An unmarried female of whatever age is under the guardianship of her father, and failing him of his kindred.[b]

Guardians of women.

186. "Day and night," says *Manu*, "must "women be held by their protectors in a state of "dependence. Their fathers protect them in child-"hood; their husbands protect them in youth; their "sons protect them in age. A woman is never fit for "independence." After her marriage, a woman is subjected to the control of her husband's family.[c]

187. The guardians of a widow are the sons of her husband, if he have left any; and, if not, guardians are to be selected from his other relations

a 22 Sutherland's Weekly Reporter, 119; 4 Indian Law Reports (Calcutta), 523.

2 Strange, 79, Colebrooke citing *Vyasa* and *Vrihaspati*.

Also Act XXXV of 1858; 5 Madras Reports, Appendix 8. Under Roman law a *curator* was appointed to a minor for purposes of litigation.

Guardians may sue for personal injuries done to their wards, but are not liable for torts committed by them; 9 Sutherland's Weekly Reporter, 327; 3 North West Reports, 191.

b Strange's Manual, § 136. A girl under sixteen years of age has not such a discretion as enables her, by giving her consent to protect any one from the criminal consequences of inducing her to leave the protection of a lawful guardian: *secus*, if over sixteen. 5 Bengal Reports, 418. What is the effect of the Indian Majority Act upon Secs. 361, 363 of the Indian Penal Code? What if the minor is taken from lawful guardianship *after* sixteen and *before* eighteen? The sections seem designed chiefly to protect the rights of the guardian.

c W. H. Macnaghten's Hindu Law, 2nd ed., 104.

1 Strange's Hindu Law, 244, 245.

by the ruling power; if there be no relations of her husband within the degree of a *sapinda*, then the kin of her own father are the guardians of the widow. In disposing of any property, she may have inherited from her husband, she is subject to the control of her legal guardians and advisers, as well as of her husband's heirs.[a]

188. A female in management of a minor's property is subject to the control of those who are her guardians. Practically, the Courts do not require assurance of the support of the guardian to acts by a female of mature age, and would not hold invalid such acts by reason of the concurrence of the guardian being wanting thereto.[b] **Position of female managers.**

189. In some of the laboring classes, the woman who contributed to the maintenance of the family may contract obligations, if for the uses of the family and render their husbands liable for the same.[c]

190. A suit cannot be brought on behalf of a Hindu minor to secure his share in undivided family property, unless there is evidence of such malversation as will endanger the minor's interest, if his share be not separately secured. The Court may relieve the minor from the guardian's authority, (*e.g.*, **Suit on behalf of minor.**

a W. H. Macnaghten's Hindu Law, 2nd ed., 104.
1 Strange's Hindu Law, 244, (245—247).
2 Ibid., 272, 273, 310, 401, Colebrooke.
W. H. Macnaghten's Hindu Law, 2nd ed., 104.
Dâya-bhâga, Chap. XI, Sec. i, 64.
See however, 3 Madras Reports, 116.

b Strange's Manual, § 138.

c Ibid., § 135.

brother's) and appoint another; but a case requiring relief must be made out.[a]

Act XV of 1856.

191. Under Act XV of 1856 provision is made for the appointment of guardians to children whose mothers have re-married, with the proviso that when the children have not property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made, otherwise than with the consent of the mother, unless the proposed guardian give security for the support and proper education of the children whilst minors.

CHAPTER V.

ADOPTION.

Grounds of adoption.

192. MARRIAGE failing in its most important object, (the birth of sons,) in order that obsequies in particular might not go unperformed, and celestial bliss be thereby forfeited, as well for ancestors as for the deceased, a son (*puttra*, a deliverer from *Put*, the place of torment,) must be adopted.[b]

a 1 Madras Reports, 105, 106.
3 Ibid., 69, 94.
See, however, 3 Madras Reports, 94, where this doctrine has been slightly modified.

b 1 Strange's Hindu Law, 74.
Dattaka Mimâmsâ, Sec. i, § 6.
Adoption is obviously a contrivance for preventing the descent being wholly interrupted, when there is no succession of kindred to carry it on. Of the two expedients (Wills and Adoptions), Adoption, the factitious creation of blood relationship, is the only one which has suggested itself to the greater part of archaic societies. The Hindus have indeed advanced one point in what was doubtless the antique practice, by allowing the widow to adopt when the father has neglected to do so. Sir Henry Maine's Ancient Law.

193. The right to adopt attaches not only where there has been a failure of male issue, but also where there is male issue and they have become disqualified for inheriting, the right of inheritance and that of performing funeral obsequies being correlative.[a]

194. A Hindu's obsequies may be performed by his widow; or, in default of her, by a whole brother or other heirs; but not with the same benefit as by a son. Hence the necessity for adoption on failure of sons, or of competent issue.

Meaning of term "issue."

195. By the expression "failure of issue," is meant son's sons and grandsons, these being on an equality as heirs.[b]

Form of adoption now practised.

196. The ancient law admitted of twelve kinds of adopted sons; of these, the one now recognized is *Dattaka*, or the son given, as distinguishable from *Aurasa*, the son by birth. The *Kritrima* form of adoption prevails in *Mithila*. In this no particular ceremonies are essential, and the adopted son does not leave the family of his natural parents.[c]

197. There is but little difference if any, between the schools as to the law of adoption, except, perhaps, in *Mithila*.

a 1 Strange's Hindu Law, 77.
Sutherland's Synopsis, Head First.
W. H. Macnaghten's Hindu Law, 2nd ed., 66, 67, Note.

b 1 Strange's Hindu Law, 76.
Ibid., 78.
W. H. Macnaghten's Hindu Law, 2nd ed., 66.

c 1 Strange's Hindu Law, 74.
2 Ibid., 194—217.
W. H. Macnaghten's Hindu Law, 2nd ed., 65.

Power of wife or widow to adopt.

198. The right of adoption, where it exists, is, as between husband and wife, absolute in the husband. The father may give in adoption without the mother's consent.[a]

Age of adoptee.

199. In making an adoption, preference is always given to the tenderest age. It may, however, be stated generally, that adoption may take place among the three superior classes any time before the performance of the *Oopanayana;* and among *Çudras*, any time before marriage. There is a great difference between the two leading authorities, the *Dattaka Mimâmsâ* and the *Dattaka Çandrikâ*, as to the time when adoption should take place among the superior classes. The former maintaining that, after the performance of the initiatory rite of *tonsure* in the natural family, the son cannot be adopted. The latter that the performance of the *Oopanayana* in the natural family is the only bar to the adoption. The rule laid down by the latter (which is the great Bengal authority) is the one generally followed.[b]

a *Dattaka Mimâmsâ*, IV, 13-17; V, 142; 1 Strange's Hindu Law, 78. As a general rule, the wife, however, should consent to the gift of a son, though she need not be privy to the acceptance of one. See 2 Strange, 131, Colebrooke citing *Mitâxarâ*. 4 Moore's Indian Appeals, 2; 11 Bombay Reports, 199.

b 1 Strange's Hindu Law, 88—91.
W. H. Macnaghten's Hindu Law, 2nd ed., 72.
Morley's Digest, Old Series, 22, note 9.
3 Madras Reports, 28.
1 Madras Sudr Decisions, 106, affirmed by Privy Council.
1 Strange's notes of cases, 133.
10 Moore's Indian Appeals, 279.
Mr. W. Macnaghten thinks that the rule of the *Dattaka Mimâmsâ* should be followed in Benares, and the *Dattaka Çandrikâ* in Bengal and Southern India.

200. The time for the performance of the *Oopanayana* varies among the three superior classes. Among *Brahmans* it is generally performed at the eighth year, and among the *Xatriyas* and *Vaiçyas* at the eleventh and twelfth respectively.[a]

Time for performance of Oopanayana among the superior classes.

201. Adoption is not required to be in writing any more than an authority to the widow to adopt. The ceremony of adoption, however, should be as public and solemn as possible, where this is not the case, there will be ground for suspicion.[b]

Procedure at adoption.

202. The procedure is thus described by *Vasishtha* as cited in the *Dattaka Mimâmsâ* :—" A man being about to adopt a son should take an unremote kinsman, having convened his kindred and announced his intention to the king, and having offered a burnt offering *(Datta-homam)* with recitation of the holy words in the middle of his dwelling."[c]

It would seem as if there really was no restriction as to age. That is to say, where an adoption of a grown-up person has been made, it will not be set aside on the ground of age. Cases of this sort have been decided in the Courts. The person adopted, however, should not be older than the adopter. This was also the Roman Law. 9 Madras Jurist, 21: 4 Bombay Reports, A. C., 191: 8 Ibid., A. C., 67, 70.

a W. H. Macnaghten's Hindu Law, 2nd ed.; 72, 73. Where the person adopted is of the same *Gotra* as the adopter, the performance of the *Oopanayana* is no bar to the adoption. 8 Madras Jurist, 58, (Travancore case).

b 1 Strange's Hindu Law, 93, 94.

c *Dattaka Mimâmsâ*, Sec. iv, § 51; and Sec. v, § 31.

As to the form of adoption, see *Dattaka Mimâmsâ* and *Dattaka Çandrikâ*, *passim;* also as to the ritual of the *Datta-homam*, see 2 Strange, 218, *et seq.*

"Ceremonial adoption" is, generally speaking, practised only by Brahmans. Among *Çudras* generally there is no such cereme-

The sacrifice of *Datta-homam.*

203. The sacrifice of *Datta-homam* is important only in a *spiritual* point of view, and only so with regard to *Brahmans.* And even with regard *to them*, it does not appear that its absence will invalidate an adoption performed correctly in other respects.[a]

204. The other classes, and particularly the *Çudras*, perform an imitation of the *Datta-homam* with texts from the *Puranas.*[b]

205. Religious ceremonies, however, may sometimes be intentionally omitted where it is desired to show that the adoption is incomplete. In such a case the absence of ceremonies would invalidate an adoption. The absence of such ceremonies would be evidence of the want of mutual assent.[c]

Effect of an agreement to adopt on subsequent adoption.

206. A mere intention to adopt may be abandoned; and even an agreement for the purpose

nial; "But public avowal or general notoriety of the fact is sufficient with them to establish its validity."—2 Strange, 39, Ellis; 13 Bengal Report, 401.

a 1 Strange's Hindu Law, 95—97.
2 Ibid., 126, Colebrooke, and 226, Ellis.
Ibid., 130, 131.
4 Madras Reports, 165.
In Bengal and generally speaking in Bombay the *Datta-homam* is considered necessary among the three superior classes, but not among *Çudras.* 16 Weekly Reporter, 179; 2 Borrodaile, 75, 87; 13 Bengal Reports, 401. The *Datta-homam* is considered necessary when the adopted son does not belong to the same *Gotra* as his adoptive father. Generally, however, the adopted son is selected from his adoptive father's *Gotra.* So that this ceremony is seldom actually necessary. 2 Knapp Privy Council Cases, 287, 290. In this case, the parties were *Brahmans.*

b See, however, note previous page.

c 25 Sutherland's Weekly Reporter, 192.

resting there would not invalidate a subsequent adoption.[a]

207. To render an adoption valid and complete, it is necessary that the person adopted should assent, or, being a minor, be given by a competent party.[b] Assent necessary to adoption.

208. The validity of an adoption for *civil* purposes consists generally in the consent of the necessary parties, the adopter having at the time no male issue, and the child to be received being within the legal age, and not being one considered ineligible for adoption.[c] The essentials of adoption.

209. In Bengal it has been held that something more than a mere *constructive* giving and taking of the boy in adoption is necessary. There must be an *actual* transfer of the proprietary interest in him. In Madras too it has been held that there must be a valid giving as well as receiving, and that where both parents are dead, and there is no one to give the child, it cannot be received. No amount of ratification can supply the essentials of such a transaction.[d]

a 1 Strange's Hindu Law, 95.
2 Ibid., 113—115, Colebrooke.

b 1 Strange's Hindu Law, 88.
Sutherland's Synopsis, Head Second.

c 1 Strange's Hindu Law, 96, 97.
1 Madras Reports, 363. An adoption invalid on account of there being a son does not become valid by death of that son.
1 Norton's Leading Cases, 78.

d 2 Bengal Reports, A. C., 279.
4 Madras Reports, 165.
This case over-rules. *Veerapermal Pillay* v. *Narrain Pillay*, 1 Strange's Notes of Cases, 78; 2 Knapp's Privy Council Cases, 290.

Dwyamushyayana.

210. The *Dwyamushyayana* (son of two fathers) form of adoption is still recognized in the present age. This form of adoption may be the result of agreement between the parties. Practically, however, this form of adoption no longer exists, except perhaps in the case of the only son of a brother.[a]

Rights and duties of adoptee.

211. Adoption being a substitution for a son begotten, its effect is, by transferring the adopted from his own family, to constitute him son to the adopted with a consequent exchange of rights and duties.[b]

212. Of these, the principal are the right of succession to the adopter on the one hand, with the correlative duty of performing for him his last obsequies on the other. In the *Dwyamushyayana* form of adoption, however, the adopted performs the funeral rites of his natural father as well. The right of succession attaches to the entire property of the adopter, real and personal, and operates *lineally* and *collaterally*.[c]

a Sutherland's Synopsis, Head Fifth.
W. H. Macnaghten's Hindu Law, 2nd ed., 101.
1 Madras Reports, 54: also Reporter's Note; 2 Knapp's Privy Council Cases, 206; 1 Madras Reports, 57; 15 Bengal Reports, 415; 13 Moore's Indian Appeals, 101; 5 Indian Appeals, 42.

b 1 Strange's Hindu Law, 97.
Sutherland's Synopsis, Head Fourth.
1 Madras Reports, 420.

c 1 Strange's Hindu Law, 97, 98; 2 Ibid., 116, 117.
W. H. Macnaghten's Hindu Law, 2nd ed., 70, 79.
Sutherland's Synopsis, cited above. 5 Bengal Reports, Full Bench, 15; 3 Knapp's Privy Council Cases, 55; 9 Sutherland's Weekly Reporter, 423.

213. The severance of an adopted son from his natural family is so complete that no mutual rights as to succession to property can arise between them.[a]

Relation of adoptee to his natural family.

214. The right of inheriting also, in general, is subject to the existence of a legitimate son born subsequent to the adoption, in which case the share of the adopted son is in Madras and Bombay one-fourth *of the share* of the son so begotten. In Bengal it is one-third of *the whole*. In provinces which follow Benares law, it is one-fourth of *the whole*.[b]

Share of adoptee in the inheritance when legitimate son subsequently born.

215. By virtue of adoption, an adopted son belongs to the "*gotra*" (family) of his adoptive father, while he disowns that of his natural parent. Adoption is generally made, however, from the same *gotra*. His relation, too, as *sapinda* in the family of his adoptive father, commences from the date of his adoption. According to Bengal law his relationship with his natural family is not severed.[c]

Adoptee's gotra and sapindaship.

a 2 Strange's Hindu Law, 124, 125, 129, Colebrooke.
Sutherland's Synopsis, cited above.
1 Madras Reports, 180.

b 1 Strange's Hindu Law, 98, 99.
W. H. Macnaghten's Hindu Law, 2nd ed., 70; 9 Sutherland's Weekly Reporter, 423.
Sutherland's Synopsis, Head Fifth.
Mitâksharâ, Chap. I, Sec. xi, § 24, as explained in the *Saraswati Vilasa*.
1 Madras Reports, 45, and Reporter's Note, where all the authorities are cited.
Dâya-bhâga, Chap. X, Sec. 7. According to some authorities, among *Çudras* the adopted and the afterborn sons share alike.

c Sutherland's Synopsis, Heads Third and Fourth, and Note xx.
The *Dwyamushyayana*, however, will be sapinda in both families. See *Dattaka Çandrikâ*, Sec. iii, § 25; Shamchurn's *Vyavastha Darpana*, 889, 1st ed.

216. It is by the performance of the *Datta-homam* that the adopted son is converted from the *gotra* of his natural to that of his adoptive father.[a]

The rights of the *Dwyamushyayana.*

217. The adopted son, who is son of two fathers, (*Dwyamushyayana,*) inherits the estate and performs the obsequies of both fathers; but the relation of his issue obtains exclusively to the family of the adoptive father.[b]

218. In the case of the above form of adoption, where a legitimate son is born to the adopter subsequent to the adoption, it would appear from the *Dattaka-Çandrikâ,* that such son (*Dwyamushyayana*) would only take half the share to which the son absolutely adopted would be entitled in participating with a legitimate son subsequently born.[c]

219. On the same principle, this author appears to provide that where legitimate issue is subsequently born to the natural father, the *Dwyamushyayana* only takes in the estate of such father, the half of the share of a legitimate son.[d]

220. An adopted son is incapable of contracting marriage in the family from which he was taken. Nor can the son of two fathers marry into the general family of either.[e]

a 2 Strange, 89, 220, Ellis.

b Sutherland's Synopsis, Head Fifth.

c Ibid.

d Ibid.

e 1 Madras Reports, 420. That is, of course, within the prohibited degrees. See Sutherland's Synopsis, Head Fourth.

221. The natural rights of a person adopted remain unaffected when the adoption is invalid.[a] **Rights of person where adoption invalid.**

222. A second adoption may be made where the first has failed, whether effected by the man himself, or by his widow or widows after his death duly authorized.[b] **When adoptions and cannot be made.**

223. A double adoption is invalid. This was decided in the well known case of *Rungammah* v. *Atchumma* in the Madras Presidency, in which the late Sudr adopting the opinions of the Pundits held that a second adoption, while the first adopted son was living, was valid. This, however, was over-ruled by the Privy Council, and the law on the subject is now settled.[c]

224. Nor can more than one son be adopted at a time ?[d]

225. In a selection for the purpose of adoption, consideration is to be had of the *class* to which the child to be adopted belongs; of his *relation* as well to the adopted as to his own family; of his *age;* and, lastly, with regard to *Brahmans*, to what extent his *initiatory ceremonies* have or have not been already performed.[e] **Qualification of adoptee.**

a 1 Madras Reports, 363. In one case the Madras High Court held that the adoptee whose adoption was invalid was entitled to maintenance in the adopter's family. 1 Madras Reports, 45.

b 1 Strange's Hindu Law, 78.

c 2 Ibid., 85, Sutherland.
4 Moore's Indian Appeals, 89.

d 2 Indian Jurist, New Series, 24. Bourke's Reports, O. C., 189.

e 1 Strange's Hindu Law, 82.

226. As in marriage, so in adoption, the parties must be of the same class.[a]

Adoption necessary to all.

227. The necessity of adoption applies whether a man be single, married, or a widower.[b]

228. An impotent man may adopt, and so may a minor. At least there is no provision in Hindu law against adoption by a minor. A minor widow also may adopt. The consent of the guardian will be sufficient, unless the minor has attained to years of discretion.[c]

229. One who has been adopted, can himself adopt. A family may thus be kept up by a succession of adoptions.[d]

Adoption not to be made during pregnancy.

230. An adoption should not be made during the wife's pregnancy, for there is the possibility of the birth of a son: such an adoption is invalid even though a daughter should be born.[e]

Power of widow to adopt.

231. A wife, or widow, cannot adopt without the assent of her husband. She may, if the distress

a 1 Strange's Hindu Law, 82.

b Ibid., 77.
W. H. Macnaghten's Hindu Law, 2nd ed., 66, Note.
2 Madras Reports, 367; 4 Ibid., 270.

c *Dattaka Çandrikâ*, Sec. 6.
Dattaka Mimâmsâ, Sec. i, § 4.
At what age may a minor be said to have arrived at years of discretion? Ibid., Sec. v, § 3; 15 Sutherland's Weekly Reporter, 548; 3 Indian Appeals, 83.

d Strange's Manual, § 64. See case of *Rawutpore Raj*, 5 Moore's I. A., 169.

e Ibid., § 56. 1 Coryton's Reports, 42.

be urgent, but the adoption is on his account, not hers. If the husband be dead, physically, or civilly, or have permanently emigrated, she may then adopt without his consent.[a]

Dravidian law on the subject.

232. According to the law of the *Dravida* School in an undivided family, a widow not having her husband's permission, may adopt with the consent of her husband's kinsmen. If the father of the husband be alive, his sole assent would be sufficient, as the head of the family, and the natural guardian of the widow. If there be no father, then the consent of all the brothers would probably be required.[b]

233. In a divided family the difficulty to lay down a rule is greater. In such a case the consent of the father-in-law as the natural guardian and "venerable protector" of the widow would be sufficient. Where there was no father-in-law, there should be such evidence of the assent of kinsmen as would suffice to show that the act is done by the widow in the proper and *bonâ fide* performance of a

a 1 Strange's Hindu Law, 79.
2 Ibid., 84, Sutherland.
1 Strange's Hindu Law, 82.
W. H. Macnaghten's Hindu Law, 2nd ed., 66, citing *Dattaka Mimâmsâ.* In the *Ramnâd* Adoption case, 2 Madras Reports, 206, the High Court held that a widow could adopt without the assent of her husband according to Hindu Law. An elaborate judgment was passed by Mr. *Justice Holloway* in which all the authorities on the subject were reviewed. In this case it was held that if the assent of sapindas and the adopter was anything more than a moral precept, the assent of *one* sapinda was sufficient. The judgment, however, was reversed in appeal by the Privy Council. See *post.*

b 12 Moore's Indian Appeals, 397. This is the Appeal in the *Ramnâd* Adoption case.

religious duty, and neither capriciously, nor from a corrupt motive.[a]

234. The power to adopt cannot be inferred, when a prohibition by the husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family, which afford no plea for a supersession of heirs, on the ground of religious obligation to adopt a son, in order to complete or fulfil defective religious rites.[b]

a 12 Moore's Indian Appeals, 397.

b Ibid. 3 Indian Appeals, 154, 190. The *above* rulings as to adoption by a widow over-rule the doctrine propounded by the Madras High Court in 2 Madras Reports, 206 and 7 Ibid., 301, as to the assent of one sapinda being sufficient for such adoption. The assent of the *majority* of the *sapindas* is sufficient. 3 Madras Reports, 283. These judgments were discussed by the *Travancore Sudr* in a case in which a widow adopted *without* the consent of her husband's *undivided* brother but *with* the consent of the *divided* kinsman. The Court decided against the sufficiency of the authority. 8 Madras Jurist, 58.

In the case reported at 7 Madras Reports, 301, known as the *Chinna Kimedy* case from *Berhampore*, the High Court (Mr. *Justice Holloway)* adhered substantially to his judgment in the *Ramnâd* adoption case and tabulated the findings in both cases as follows:

1. The adoption by the widow with the assent of a *sapinda* is a substitute for the actual begetting by a *sapinda*.
2. That the argument from analogy is in favor of the assent of one sapinda rather than of more.
3. That his assent is not to supply a capacity—for rights but a capacity—for action.
4. That proximity to the deceased with respect to rights of property is wholly beside the question, and that if this were not so, the rule would be entirely defeated.
5. That in the present case that capacity has been sufficiently supplied, as, in the law which this assent of *sapindas* has super-

235. The authority to adopt need not be in writing, nor is any particular form required. It may be by will.[a]

Authority to adopt and its incidents.

236. When a particular child is adopted under the authority, the power of adoption ceases, and cannot be revived to effect another adoption. If the child dies or becomes disqualified before adoption, the widow may select another under the authority.[b]

237. Where a widow exercises a power of adoption after her husband's property has vested in another, the son adopted cannot succeed to her husband's property. He is only entitled to mainte-

seded, a child begotten by this assenting *sapinda* would have been undoubtedly legitimate.

In appeal the Privy Council, though upholding the finding of the High Court as to there being a written authority to adopt, dissented from the views propounded in the judgment as to there being any analogy between the old law of raising up issue to the deceased husband by the "appointed kinsman" and an adoption by the widow. They also followed the principle laid down by the *Travancore Sudr.* above cited that, in an *undivided* family the assent of *sapindas within the family* was to be obtained. In another case, from *Guntûr*, the High Court, misinterpreting a passage in the judgment of the Privy Council in the *Ramnâd* case, held *that a proper motive* in making the adoption had not been shown on the part of the widow and that therefore the adoption was invalid. In appeal the judgment was reversed, the Privy Council holding that, it would be very dangerous to import into these cases of adoption nice questions as to the particular motives which operated on the mind of the widow. All that they meant to lay down in the *Ramnâd* case was that, there should be such proof of assent on the part of the *sapindas*, as should be sufficient to support the inference that the adoption was made by the widow upon a fair consideration of the expediency of substituting an heir by adoption to her deceased husband.

a 1 Strange's Hindu law, 80; 1 Hyde's Reports, 223.

b 1 Norton's Leading Cases, 94.

nance. Theoretically, the only object gained by adoption is the performance of obsequies. Practically, however, the object appears to be to perpetuate the family name.[a]

238. The authority to adopt must be strictly pursued: nor can a widow modify or alter an *illegal* authority to adopt.[b]

239. There cannot be a conditional adoption, but there may be a conditional power of adoption, so as to provide for successive adoptions.

340. A widow's refusing, or omitting to adopt under the authority given to her, does not thereby affect her own heritable right. She is not bound to act upon the authority. Her discretion is absolute. Nor is there any limit in the time within which she is to act.[c]

When widow may and may not adopt.

241. A widow who has become unchaste, in living in concubinage, and is in a state of pregnancy, is incompetent to receive a son in adoption.[d]

242. A widow's right to adopt is not affected by the fact that she takes as heir of a deceased son, and not immediately from the husband.[e]

a 10 Moore's Indian Appeals, 304.
7 Sutherland's Weekly Reporter, 392.

b 5 Sudr Dewanny Reports, (Bengal) 461.
12 Moore's Indian Appeals, 356.

c 7 Ibid., 169, 190; 1 Strange's Notes of cases, 111; 1 Borrodaile's Reports, 181; See however 6 Sutherland's Weekly Reporter, 221.

d 5 Bengal Reports, 362.
13 Ibid., 14.

e Cunningham's Digest, § 282, citing *Rajah Vellanki Venkata Kistna Row* v. *Rajah V. V. Lakshmi Narrayan*, Privy Council, 3rd November 1876.

243. Where there are two widows they may, if so authorised, adopt in succession.[a]

244. A mother, however, cannot adopt to her son, nor can permission be given her to adopt: and if a widow adopt to herself, the adoptee acquires no right to her husband's property after her death. Power of widow to adopt without consent of husband.

245. In Bengal the authority of the husband is essential, and cannot be dispensed with under any circumstances. Bengal law.

246. In Bombay, however, it has been held that in the *Maharashtra* country, a widow may adopt *without* the consent of her husband, or of his kindred, if done by her *bonâ fide*, as a religious duty.[b] Bombay law.

247. In Mithila, the *Kritrima* form prevailing, the widow may adopt with or without her husband's consent, but it has been held that such son would only succeed to her property, and not to her husband's. He does not cease to be a member of his own family, and he inherits also in it. If adopted by the husband, he would inherit his property. It is necessary, too, that the adoptee should be an adult, for his consent is required.[c] Mithila law.

a 1 Norton's Leading cases, 81.

b 5 Bombay Reports, A. C., 181; 10 Ibid., 257. She cannot do so however where her husband has forbidden an adoption, 7 Bombay Reports, App., 1. Nor can she adopt during her lifetime without his assent, 7 Ibid., A. C., 193.

c 7 Sutherland's Weekly Reporter, 500; 8 Ibid., 155. Practically, according to *Mithila* law, the widow cannot receive a son in adoption according to the *Dattaka* form at all. In the *Kritrima* form, the consent of both parties is the only requisite: neither age, nor ceremonies are regarded.

Dancing girl may adopt.

248. A dancing-girl may make adoption of a daughter, if authorised by the Pagoda to which she is attached. She cannot do so of a son. To adopt, the dancing-girl must be daughterless. It is immaterial whether she have a son or not. It is questionable, however, whether an adoption by a dancing-girl is legal. It has been held that the ordinary Hindu law of adoption and division is totally inapplicable to dancing-girls. It has been held, too, that such adoptions are not necessary for the devolution of their property, for sons may inherit as well as daughters.[a]

Who may not adopt.

249. A leper, or person with incurable disease, cannot adopt, except he performs the prescribed penance, but he may authorise his wife or widow to adopt without performing any expiation.[b]

250. Nor for the same reason can a lunatic, or an idiot, or an outcaste adopt, but their wives or widows may.

251. A person under pollution in consequence of the death of a relative, or other cause, cannot adopt.[c]

252. A minor under the Court of Wards cannot give his widow authority to adopt, without the per-

a Strange's Manual, § 98.
Ibid., § 99; 2 Madras Reports, 56; Ibid., 196; Cunningham's Digest, § 257, citing Special Appeal, 579 of 1876, (Madras).

b Shamchurn's *Vyvastha Darpana*, 757.

c 9 Moore's Indian Appeals, 506.
Strange's Manual, § 63.

mission of the Court, nor can a person whose estate under the management of the Court adopts without its consent.[a]

253. Adoptive parents cannot give their son in adoption, for it would be against the agreement on which they received the boy in adoption.

Who cannot give in adoption.

254. One brother cannot give another away in adoption, even when both parents are dead, their rights being co-ordinate. For the same reason, an uncle cannot give a nephew away, nor can the paternal grandfather, nor any one else give a boy away.[b]

255. As to relationship, the general principle is that one with whose mother the adopter could not legally have married must not be adopted.[c]

Degree of relationship prohibited for adoption.

256. Under these circumstances, brothers, brothers' paternal and maternal uncles; daughters' and sisters' sons cannot be adopted. These two latter, however, are eligible to adoption among *Çudras*. A wife's brother and the son of a wife's sister may be adopted.[d]

a 9 Moore's Indian Appeals, 295, Regulation V of 1804: Act XXXV of 1858.

b Strange's Manual, §§ 97, 80. *Vyavastha Darpana*, 825, 1st ed. 10 Bombay Reports, 235.

c 1 Strange's Hindu Law, 83. Sutherland's Synopsis, Head Second. 2 Madras Reports, 462.

d 1 Strange's Hindu Law, 83, 84.
W. H. Macnaghten's Hindu Law, 2nd ed., 67.
1 Madras Reports, 424; 7 Ibid., 250. The adoption of a sister's or a daughter's son is common enough in Southern India amongst Brahmans. One well known case came before the Courts, which on account of its novelty was argued before a Full Bench. The suit was brought to set aside the adoption of a sister's son by a Brah-

Who may be adopted.

257. Subject to the above general principle, the nearest male relation of the adopter is the proper object of adoption. This is a whole brother's son, whose right to be adopted in preference to any other person, where no legal impediment exists, may be regarded as a received rule of law. On failure of *sapindas*, one must be sought from more distant kindred.[a]

Bengal law. Who cannot be adopted.

258. In Bengal, a *Brahman's* widow cannot adopt her uncle's son, nor can a sister's son be adopted there. And nowhere can an adopted son adopt his own natural brother, nor can a widow adopt the natural brother of her deceased husband.[b]

259. The adoption of an eldest or an only son (except as a *Dwyamushyayana*) though considered

man. The Court held that such adoptions were invalid according to Hindu Law, and that there was no such *universal* custom in regard to them as gave them the force of law. 7 Madras Reports, 250. See 3 Indian Law Reports, (Bombay) 273, which over-rules 4 Bombay Reports, A. C., 130. The burden of proving a special custom to the contrary amongst any members of the three regenerate classes, prevalent either in their caste, or in a particular locality, lies upon him who avers the existence of such custom. Ibid. As to adoption of wife's brother and wife's sister's son, see Madras Sudr. Decision, 1856, 213 and 1857, 94; and Bombay Select Reports, 73, 76.

a 1 Strange, 84; 2 Ibid., 102, 103, Colebrooke.
Sutherland's Synopsis, Head Second.
W. H. Macnaghten's Hindu Law, 2nd ed., 68.
Mitâxarâ, Chap. I, Sec. xi, § 36, citing Menu, 9, 182. Among *Çudras* on failure of *sapindas*, any member of the same caste may be adopted. It seems, however, now settled on the elastic principle of *factum valet* that an adoption of a stranger even where relatives are available is valid, 5 Indian Appeals, 40; 6 Bombay Reports, A. C., 70.

b 1 Madras Reports, 420, and Reporter's Note.
2 Ibid., 399.

improper, is, when made, valid according to Hindu law. This ruling has been adopted by all the Courts with regard to an eldest son. In Bengal it has been held otherwise, with regard to an only son, the principle of *factum valet* was said not to apply to such a case. The adoption of a wife's brother, too, is considered valid, it being customary.[a]

260. According to Hindu law, an orphan cannot be adopted, nor an illegitimate son.[b]

Right to maintenance and inheritance of certain adoptees.

261. The adopted son of one, whose alleged adoption has been held invalid, can make no claim through his adoptive father to be maintained by the alleged adopter.[c]

262. A person excluded from inheritance, *e.g.*, by blindness, leprosy, &c., may nevertheless adopt; but the person adopted will be subject to the same disqualification, and cannot inherit, where the claim

a 1 Strange's Hindu Law, 87.
Strange's Manual, § 91.
1 Madras Reports, 54.
W. H. Macnaghten's Hindu Law, 2nd ed., 67, note.
4 Bombay Reports, A. C., 191. The Bombay High Court have since held that the principle of *factum valet* applies only where the rule is *directory* and not where it is *mandatory*, 3 Indian Law Reports (Bombay), 273.
2 Indian law Reports (Bombay), 379.
2 Ibid., (Calcutta), 365.
3 Ibid., 443.
2 Ibid., (Allahabad), 164, Turner, J., dissenting.

b 2 Madras Reports, 129.
6 Bombay Reports, O. C., 83.
10 Ibid., 268.

c 2 Madras Reports, 129, citing Sutherland and over-ruling decision on this point in 1 Madras Reports, 45.

to inheritance can only be made through the adopter. He will be entitled to maintenance only.[a]

263. A member of a Hindu family cannot, as such, inherit the property of one taken out of that family by adoption.[b]

264. A son, whether adopted or begotten, can claim maintenance of his father until put into possession of his share of the ancestral estate.[c]

265. When an adopted son dies issueless, the property he has inherited from his adoptive father, goes to the father's heirs.[d]

266. It has been held in Bengal that an adopted son cannot succeed to the property of his adoptive maternal *bandhus,* nor do they succeed him.[e]

267. A son adopted to one wife, does not become an heir to a co-wife, and *vice versâ*, the co-wife is not his heir. He may, however, inherit the latter's *Stridhana* as also that of the former.[f]

a 1 Strange's Hindu Law, 98.
See, however, Sutherland's Synopsis, Note iv, citing *Dattaka Çandrikâ* and *Mitâxarâ*. Madras Sudr Decisions, 1857, 210.

b 2 Strange, 124, 225, Colebrooke, citing *Manu* and *Mitâxarâ*.
1 Madras Reports, 180.

c Ibid., 45.

d Madras Sudder Decisions, 1859, 265.

e Sutherland's Full Bench Rulings, 121. This question, however, does not seem to be quite settled. In Madras it has been held that an adopted son cannot succeed to the estate of his adoptive mother's father in preference to the grandson of her father's brother, 7 Madras Reports, 245.

f Weekly Reporter for 1864, 71; 3 Ibid., 49.

268. Where a widow adopts, her husband's estate descending to her on his death, adoption subsequent devests her succession, like the case of a posthumous child. While, on the other hand, where the adopted, surviving his adopted father, dies unmarried and issueless, the widow of the latter, if living, succeeds as legal mother to the adopted.[a]

Effect of adoption on widow's inheritance.

269. An adopted son is liable for debts contracted by his natural father, whether contracted by the father in person, or by the adopted as his father's agent.[b]

Adopter liable for natural father's debts.

270. There is a similarity between the Hindu and the Roman law as to adoption. Under Roman law there were two kinds of adoption—*adoptio* properly so-called and *adrogatio.* The first was the ceremony by which a child or grandchild, *under the power of its parents*, was transferred to another. When the person *was not in the power of his parent*, the ceremony was called *adrogatio.* The peculiarity of this latter adoption was that, if a man had sons,

Roman law.

a 1 Strange's Hindu Law, 101. The estate of any person in possession will be devested who has not a preferable title. 3 Indian Appeal, 154. If the estate be vested in a person who has a preferable title to the adoptee, the estate will not be devested by the adoption, 10 Moore's Indian Appeals, 310; 4 Indian Appeals, 1; 8 Madras Reports, 108.

2 Ibid., 129, Colebrooke.

W. H. Macnaghten's Hindu law, 70, 71, 2nd ed.

10 Moore's Indian Appeals, 279.

b 2 Strange, 124, 225, Colebrooke, citing *Manu* and *Mitâxarâ.*

and was adopted by another, he became the son, and his sons the grandsons of the adopted.[a]

271. The capacity to contract marriage was the only qualification necessary to enable a man to adopt.[b]

272. Women at one time under Roman law were not permitted to adopt, but subsequently they were allowed to do so to console them for the loss of children.[c]

273. A person older than the adopter could not be adopted, for a son should not be older than his father. The adopter therefore was obliged to be eighteen years older than the person adopted, that is, the adopted had to be older by the full age of puberty.[d]

274. A person without a son could adopt a grandson, if he had a son, he could not adopt a grandson without the son's consent.

275. According to the ancient Roman law an adopted child, as in Hindu law, became one of the adopter's family, and lost all connection with his natural family. This was found to create inconvenience, and in some instance injustice, and a

a Institutes of Justinian, 1, 11. When a Roman citizen *abrogated* a son by adoption he succeeded *universally* to the adoptive child's estate and obligations. The converse is rather the case under Hindu law.

b Ibid., 1, 11, 10.

c Ibid.

d Ibid., 1, 11, 4.

distinction therefore was drawn between an adoption by *a stranger*, and one by a relative, an ascendant, *e.g.*, grandfather. In the former case, the tie with the natural family subsisted, in the latter it did not, for the existence of the relationship, it was supposed, would prevent injustice.[a]

276. A son used to be named sometimes by will. Under the ancient law, a son could not object to be adopted, but under the new legislation, he had a right to object.

277. Adoption is permitted under the Civil Code in France, but it is not legalized either in England or Scotland.

CHAPTER VI.

INHERITANCE.

Co-parcenery the normal condition of a Hindu family.

278. THE normal condition of a Hindu family is that of co-parcenery with the right of survivorship resembling joint tenancy under English law: the estate being under the control of a managing member, generally the eldest of the family whose acts to be of validity must be for the general good. The exception to this rule of co-parcenery is the case of the succession to a Raj or Zemindary or other impartible estate in which the descent is to a *single* heir.[b]

a Institutes of Justinian, 1, 11, 2.

b See further *post*, 1 Strange's Hindu Law, 120, 198, 199, 200.

The estate of a Hindu descends to *all* his heirs just as the *hœreditas* did under Roman law. There are two kinds of succession under Roman law, *testamentary* and *legal*, the latter is succession *ab intestato*. In each case the *hœres* or heir is universal successor.

Inheritance in an undivided family.

279. Where a man dies undivided leaving sons, grandsons, or great-grandsons, as the case may be, they represent his undivided rights, while the females of his family continue to depend on the aggregate fund till a partition takes place. In the absence of male issue, the property will vest equally in his surviving undivided brothers and eventually in the widow of the last surviving. On the deaths of any of these, their male issue, if any, will succeed in like manner, after whom the property will descend to the widow of the last surviving. The widows of the deceased undivided brothers or cousins have no right to a share, though they have to maintenance. It afterwards goes to divided relations in their order.[a]

280. The sons in an undivided Hindu family although they have a proprietary right in the paternal and ancestral estate have not independent dominion.

Power of parcener over self-acquisition.

281. Where, however, the co-parcener possesses self-acquired immovable property, he may, at his death, dispose of it as he pleases, provided he has no male issue. Self-acquired movable property, however, may be disposed of under any circumstances. Self-acquisition not disposed of, descends, of course, to the heirs.[b]

a 1 Strange's Hindu Law, 120, 198, 199; 2 Ibid., 231, 232, Colebrooke. W. H. Macnaghten's Hindu Law, 17, 18, 2nd ed.

b 1 Strange's Hindu Law, 20, 21. 1 Madras Reports, 412. See *ante* Chap. II.

282. The self-acquired immovable property of an undivided co-parcener also will not, at his death, without issue, be subject to the right of survivorship, but will descend to the widow. If he have issue, it will descend to them and his widow will be entitled only to maintenance. In default of issue or widow, it will go to the collaterals.[a] **Descent of self-acquired immovable property of parcener.**

283. An undivided co-parcener is entitled, during his life-time, to the separate enjoyment of his self-acquired property, movable and immovable.[b] **Right of parcener to enjoy self-acquisition.**

284. In Bengal, where an undivided co-parcener dies leaving a childless widow, his share does not vest in the surviving parceners, but descends to his widow as his heir; whereas the *Mitâxarâ* restricts her right of inheriting to the case of her husband so dying separated; allowing her, where he dies undivided, a maintenance only. The widow, however, will inherit where there are no undivided heirs.[c] **Bengal law.**

a *Katama Nachyar* v. *Rajah of Sivagungah*, 9 Moore's Indian Appeals, 604.

1 Madras Reports, 374.

b Ibid., 412.

c 1 Strange's Hindu Law, 121; 2 Ibid., 231—233. By this mode of descent in Bengal the share may pass to a different family while the family is in a state of co-parcenery.

W. H. Macnaghten's Hindu Law, 19, 2nd ed.

Mitâxarâ, Chap. II, Sec. i, § 39.

1 Madras Reports, 412.

2 Ibid., 117.

Ibid., 325.

Under Madras Law, widow will take property vesting in the husband, although actual possession of the husband is postponed. 2 Madras Reports, 462.

Course of descent of divided and undivided property of parceners.

285. Where a residue is left undivided upon partition, what is divided goes as separate property; what is undivided follows the family property—the law of succession follows the nature of the property and of the interest in it.[a]

Two principles upon which succession depends spiritual benefit and survivorship.

286. There are two principles on which the rule of succession, according to the Hindu law, appears to depend: the first is that which determines the right to offer the funeral oblation, and the *degree* in which the person making the offering is supposed to minister to the spiritual benefit of the deceased; the other is, an assumed right of *survivorship*.[b]

Spiritual benefit.

287. The principal ground on which the leading rule of inheritance is based in all the schools, generally speaking, is the *spiritual benefit* to be derived by the deceased from the performance of funeral obsequies.

Leading rule of Bengal.

288. Of this principle the *Dâya-bhâga*, the chief authority in Bengal, is the leading exponent. According to the *Mitâxarâ*, however, preference is given to the principle of survivorship, and nearness of relationship. As the succession under the Bengal school devolves entirely according to the rule of *spiritual benefit,* and not propinquity of relationship, it is easy to see why in Bengal females are so generally

a 2 Madras Reports, 325; 9 Moore's Indian Appeals, 539.

b Ibid. The mere performance of funeral rites, however, gives no right of inheritance.

2 Strange's Hindu Law, 242, Colebrooke.

postponed to males, and the interest that is allowed them in property is so very limited.[a]

289. The principle of survivorship applies on the failure of male issue, and it conflicts with the rights of the widow.

290. In Madras it has been held that the right of survivorship depends upon the *status* of the deceased co-parcener only, and not upon the nature of the estate he has left. This is opposed to the *Mitâxarâ* generally and to the decision of the Privy Council in the *Sivagungah* case, which decided that the rule of survivorship did not apply when the property was self-acquired.[b]

Heir must be begotten.

291. It is not necessary that the heir should be born when the inheritance falls in. It is sufficient that he should have been begotten, and afterwards born with vitality.[c]

When right of inheritance attaches in a divided family.

292. The right of inheritance attaches, not only upon the father's demise, but upon his renunciation of worldly concerns, or after long absence from his family.[d]

a According to Burnell *the rule of survivorship* is unknown to Hindu Law. Preface to *Varadaraja's Vyavaharanirnaya.* Mr. Mayne seems to be of opinion that females are favored in Bengal in the matter of inheritance.

b 1 Madras Reports, 412; 9 Moore's Indian Appeals, 539.

c Elberling, 40.

d 1 Strange's Hindu Law, 122, 131, 132, 134, 135.

According to Colebrooke, a man may be considered dead after 20 years' absence if he be in the first period of life; after 15 years, if of the middle age; and after 12 years, if in the latter period of life. See 2 Strange, 238.

See also 1 Indian Law Reports (Allahabad), 53.

Sons. 293. In the series of a Hindu's heirs, the first in order is his male issue, legitimately born; or, in default, its substitute and equivalent, a legally adopted son.[a]

294. The heirs of a man include not only his sons, but his grandsons and his great-grandsons. All these constitute but one heir, possessing co-ordinate rights and stepping into each other's places in case of death.[b]

295. The right of lineal representation stops at the *fourth* degree, except in the case of absence in a distant country, when it extends as far as the *seventh* degree. The inheritance is kept open to the remotest *sapinda* on the presumption that an intermediate descendant may have survived to transmit it to him.[c]

a 1 Strange's Hindu Law, 123. The relation of foster son is not recognised by Hindu law: that is, it gives no right of inheritance. 1 Madras Reports, 320.

b Ibid., 123, 124, 198.

c Ibid., 124, 125; Strange's Manual, § 324.

It has been held in Madras on the authority of *Gans*, that the right of representation does not exist under Hindu law, and that the law of inheritance is "*the law of inheritance of the offerings to the dead.*" Per *Holloway*, J. Notwithstanding this high authority, however, it is generally admitted at the present day, at any rate under the *Mitâsarâ*, that the doctrine of representation does prevail in Hindu law. Such expressions as "the widow being half the body of her husband," and "the son and daughter being said to proceed from the limbs of the father, are something more than fanciful symbols." There is no doubt too, that the use of the son is as much to keep up the lineage of the ancestor, as to offer funeral obsequies. With regard to spiritual benefit being the only criterion of heirship, Sir Harry Maine, in his Village Communities, p. 53, observes that, no trace of this theory

296. When, however, the great-grandson survives his ancestor and dies, the property inherited by him would devolve upon his son in consequence of its having vested in the father. Lineal succession is *per stirpes* and not *per capita.*[a]

297. The son's preferable right of inheritance rests on his presenting the greatest number of beneficial offerings, while the same degree is attributable, in default of their respective fathers, to the grandson, or great-grandson, but not to any ulterior representative.[b]

298. Upon this principle also, if a man leave a son, and the son of another son and the son's son of a third son, they take equal shares of his estate, *because* they confer the benefit equally.[c]

299. In deciding the question of right of inheritance, however, payment of the deceased's debts,

is found in the ancient unwritten customs of the Hindus, and that the idea is purely one of modern growth. Further, it is this right of representation which has broken up the joint system of inheritance with its rights of survivorship which anciently prevailed, and has helped to form the system of separate and lineal succession which is now in vogue. See also 1 Strange's Hindu Law, 124, and 2 Bombay Reports, 10, in which *Arnould*, C. J., held that, the doctrine of representation prevails even among daughters, as well as sons, and that a daughter's son succeeds as his mother's representative. See also 1 Indian Law Reports (Allahabad), 105. 2 Bombay Law Reports, 388. See this subject discussed at length by Mr. Mayne, Hindu Law, Chap. XVI, 2nd ed.

a 1 Strange's Hindu Law, 123.

b Ibid., 128. Under the *Mitâxarâ* the right to offer funeral oblations decides the degree of relationship and consequent right to succeed.

c Ibid., 128, 129.

as well as nearness of kin, or proximity by birth, should enter as conjoint considerations.[a]

300. The mere performance of exequial rites, however, gives no title to inheritance; but, on the other hand, the heir being the nearest of kin, the most competent, is bound to the due performance for the deceased, to whose property he has succeeded.[b]

Grandsons and great-grandsons. 301. Grandsons and great-grandsons inherit *per stirpes* and not *per capita,* that is, the sons, however numerous, of one son and grandson respectively, take no more than the sons, however few, of another son and grandson respectively—their shares being the same as those to which their respective fathers would have been entitled, had they survived.[c]

302. The share of a son demising before the inheritance falls in, is not kept alive for his widow.[d]

Apratibandha* and *sapratibandha. 303. The heritable pretension of a son being immediate, is termed *apratibandha,* "heritage not liable to obstruction;" while that of remoter heirs is termed *sapratibandha,* "liable to obstruction," by the intervening birth of nearer ones, the title

a 1 Strange's Hindu Law, 128, 129.
b Ibid., 129, 130.
2 Ibid., 242, Colebrooke.
W. H. Macnaghten, 36, 2nd ed.
c 1 Strange's Hindu Law, 18.
2 Ibid., 242, Colebrooke.
W. H. Macnaghten, 66, 2nd ed.
d 2 1 Strange's Hindu Law, 231, 232, Colebrooke.

in the one case being *apparent*, in the other *presumptive*.[a]

304. Illegitimate children are a charge upon the inheritance, but do not inherit by the Hindu, any more than by the English law, excepting in the *Çudra* class. So also do the sons of illegitimate sons.[b] **Illegitimate sons.**

305. Amongst *Çudras*, illegitimate participate with legitimate sons, if there by any, to the extent of a half share; and if there be none, nor daughters nor daughter's sons, they are then not distinguishable in point of inheritance from legitimate ones. Illegitimate sons, however, cannot inherit to collaterals.[c]

a 2 1 Strange's Hindu Law, 131.
b Ibid., 132.
1 Madras Reports, 478; 2 Ibid., 369.
Mitâxarâ, Chap. I, Sec. xii, §§ 1, 2, 3.
12 Moore's Indian Appeals, 203, 497.
7 Ibid., 18.
c 1 Strange's Hindu Law, 132.
W. H. Macnaghten's Hindu Law, 18, 2nd ed.; *Manu*, IX, 179.
See also *Mitâxarâ* above cited.
2 Madras Reports, 293.
2 W. Macnaghten, 15 n.
See also 4 Madras Reports, 204. This case decides that the intercourse must have been continuous and the woman unmarried, if the intercourse is adulterous, the issue will not inherit. 4 Madras Reports, 234. In this case it was held an illegitimate son among *Çudras* inherited in preference to a brother's son. 1 Indian Law Reports (Bombay), 97.
12 Moore's Indian Appeals, 253.
13 Ibid., 159. In Bombay it seems to be held that the illegitimate son takes the inheritance before the widow whom, however, he must maintain while he may share it with the daughter and daughter's son. *Sed quære.* 1 Indian Law Reports (Bombay), 97.

306. In Bengal it has been held that the right belongs only to the illegitimate sons of a *Çudra* by a female *slave*, or a female slave of his slave. In Madras, Bombay, and Allahabad it is not necessary that the mother of the illegitimate son should be a slave in the proper sense of the term. It is sufficient if she is unmarried.[a]

307. The sons of a *Brahman* woman living in concubinage with a foreigner (*Meleecha*) are Hindus (*Çudras*), or a class still lower, and their rights are to be determined by the rights of the class to which they belong. In the absence of preferable heirs, too, they inherit the property of their mother and of one another.[b]

Rights of sons by different wives.

308. Where a man has more wives than one of the same caste, all his sons are upon an equality, though they are the offspring of several wives, and though the number of sons by each differs. They severally take *per capita*, and their rights in the distribution of property are not affected in any way by the order of their mothers' marriages.[c]

An heir cannot be disinherited.

309. A man cannot disinherit his heir in favor of another. And even where this has prevailed as a

a 8 Moore's Indian Appeals, 142.
1 Indian Law Reports (Calcutta), 1. See above Madras Decisions. West and Buhler, 104-110; 2 Indian Law Reports (Allahabad), 134.

b 2 Madras Reports, 196.
1 Strange's Hindu Law, 205.
3 Madras Reports, 75.

custom, it has not the force of law. The law of inheritance extends to all persons and classes alike.[a]

310. A Hindu widow, whether childless or not, stands next in the order of succession on failure of male issue, and where there are several widows, they inherit together with survivorship.[b] Widows.

311. Where a man left two wives, and one predeceased him leaving three daughters while the other survived him and was childless, it was held that the childless widow succeeded to the husband's property in preference to the three daughters. So also, where two married undivided brothers died in succession without male issue leaving widows, the widow of the one who died last would succeed, while the other would be only entitled to maintenance.[c]

312. A widow's right to succeed her husband, however, is subject to the single condition of her having been faithful to him during coverture, an unchaste wife being excluded from the inheritance. But nothing short of actual infidelity in this respect disqualifies; the presumption of guilt, however, suffices for her disinherison. Where the estate has once vested, unchastity will not *devest* it.[d]

a 1 Strange's Hindu Law, 159, Note.
1 Madras Reports, 51.

b Ibid., 223; 11 Moore's Indian Appeals, 487; 4 Indian Appeals, 212.

c Ibid. Where the estate is impartible, the senior widow would succeed maintaining the others.

d 1 Strange's Hindu Law, 136.
2 Ibid., 270, 272, Colebrooke and Ellis.
Mitâxarâ, Chap. II, Sec. i, §§ 2, 37.
13 Bengal Reports 1; 2 Indian Law Reports (Allahabad), 150, 171.

313. In Bengal the reason of the widow's succession is her celebration of acts after her husband's death spiritually beneficial to him only in a degree less than those performed by a son. She succeeds in Madras on the principle of *survivorship,* she being the *surviving* half of her husband's body, as well as on the ground of her competence to perform funeral rites. The doctrine that a woman can only inherit, through having male issue, is untenable.[a]

314. A widow, being the mother of daughters, takes her husband's property, both movable and immovable, where the family is divided; but a childless widow takes only the movable property. Where there are two widows, one the mother of daughters, and the other childless, the former alone takes the immovable estate, and the movable property is equally divided between them. This is not Madras law.[b]

315. A Hindu widow has an absolute right to the fullest beneficial interest in her husband's property inherited by her for her life. She takes, as heir, a proprietary estate in the land, absolute for some purposes, although, in some respects, subject to special qualifications, and her disposition of the property is good for her life. The proposition that a widow has no estate in her husband's immovable

a 1 Strange's Hindu Law, 135, 136. The expression "*surviving half*" is doubtless expressive of *nearness of relationship*.
2 Ibid., 239, Sutherland.
Mitâxarâ, Chap. II, Sec. i, § 15, *et seq*.

b W. H. Macnaghten's Hindu Law, 21, 2nd ed., citing *Smṛti Çandrikâ*.

property, but only the personal enjoyment of the usufruct, is untenable.[a]

316. The application of such terms as *life-estate* and *life-tenancy* to the inheritance of a widow seems improper. It appears doubtful, upon the Hindu authorities, whether a widow really takes the limited interest which she is supposed to do in her *divided* husband's estate. The opinion seems to be founded upon passages like the following from *Katyayana:* Let the sonless widow preserving unsullied the bed of her lord and abiding with her venerable protector *(Guru)* enjoy *with moderation* the property until her death. After her let the heirs take it. The author of the *Smṝti Çandrikâ,* explains that this passage applies to the case of a widow belonging to an *undivided* family. The decisions of the Courts have, however, authoritatively decided the question.[b]

Widow to be maintained when she does not inherit.

317. Where, of course, a widow does not inherit, she is entitled to maintenance. And in allowing

a 3 Madras Reports, 116, citing *Collector of Masulipatam* v. *Kavaly Vencata Narrayanappa,* 8 Moore's Indian Appeal Cases, 350, and the *Sivagungah Zamindari* case, 9 Moore's Indian Appeal Cases, 604.

2 Ibid., 393. See also, as to functions of widow over property, 2 Madras Reports, 409; 1 Ibid., 374; Ibid., 384; 2 Ibid., 462. Also 2 Madras Reports, 402, which places a mother inheriting from her son in the same position as a widow inheriting from her husband. It also decides that all property inherited by a woman is not *Stridhana.* See Chap. II, on Property.

b 8 Moore's Indian Appeals, 550. It certainly seems incongruous that, while admittedly the Hindu law has been enlarged in other respects to meet the wants of an advancing state of society, in the matter of *women's rights* it should not be so extended and that Hindu women should be kept in a state of comparative thraldom.

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her this, regard must be had to her separate property, so that her allotment, including her separate property, must be made equal to a full share. In an undivided family, the widow does not inherit, but is only entitled to maintenance.[a]

318. An unchaste widow forfeits her right to maintenance: and a widow re-marrying, forfeits her rights of inheritance, &c.[b]

Daughters. 319. In default of sons and widow, the daughters succeed, on the ground of their conferring proportionate benefits on the deceased. They take, in common, not indiscriminately, but in order as they are single, married, or widows. The *Mitâxarâ*, however, citing *Vrihaspati* bases her right upon *relationship*. *Vrihaspati* says:—"As a son, so does the daughter of a man proceed from his several limbs. How then should any other person take her father's wealth?" The daughter therefore takes as *heir*, and not like the widow, as the *surviviny half.* She obtains ownership, like the son, by birth.[c]

a 1 Strange's Hindu Law, 134, 171. A daughter is heir only to her own father. In Bombay, however, a granddaughter and a brother's daughter may inherit.
2 Ibid., 290, 295—297, Colebrooke.

b 1 Ibid., 172; 1 Madras Reports, 372. See however, 1 Indian Law Reports (Allahabad), 46. Act XV of 1856. See further Chap. VII.

c 1 Strange's Hindu Law, 138.
Smṛti Çandrikâ, 51, 127.
As to daughter's estate, see Madras Sudder Reports for 1854, 153; 6 Madras Reports, 310; 3 Perry's Oriental Cases, 5.
2 Sevestre's Reports, 1; Weekly Reporter for 1864, 197; 12 Ibid., C. R., 453.

320. The single, though there should be but one of that description, takes the whole of the inheritance first, to the exclusion of the rest of her sisters during her life. The single having enjoyed it, it vests next in the married ones, and, finally, in such as are widows. Where there are several daughters, they hold the estate jointly and take by survivorship, just as in the case of widows.[a]

321. No preference is given to a daughter, who has, or is likely to have male issue, under the *Mitâxarâ* over a daughter who is barren or a childless widow. The unendowed, however, succeed before the endowed. This is also the law of Bombay.[b]

2 Agra Reports, A. C., 166. *Devcoorerbai's* Case, 1 Bombay Reports, 130.

2 Indian Appeals, 126. This last decision, however, seems to limit her interest. The same rules as to chastity in the case of the widow apply also to the daughter.

a 1 Strange's Hindu Law, 138. They cannot divide so as to split up the joint title into several ones.

W. H. Macnaghten's Hindu Law, 22, 2nd ed.

2 Digest, 542, 3rd ed.

Mitâxarâ, Chap. II, Sec. ii.

See also judgment in *Sivagungah* case.

5 Indian Appeals, 46. The *Smṛti Çandrikâ*, however, favors the doctrine of religious efficacy in the case of daughters. *Smṛti Çandrikâ*, XI, 20, 21.

b Ibid.

2 Bombay Reports, 5.

6 Ibid., A. C., 183.

2 Strange, 242, Colebrooke.

It has been thought by some that, according to the Benares school, daughters could only inherit through their sons, and this doctrine appears to be upheld by the *Smṛti Çandrikâ*, but the *Mitâxarâ*, the paramount authority in Southern India, entirely con-

Bengal law. 322. According to Bengal law, married daughters who have, or who are likely to have male issue, are together entitled to succession, while under no circumstances can the daughters, who are either barren, or widows destitute of male issue, or the mothers of daughters only, inherit the property. This doctrine is peculiar to Bengal—it is not allowed elsewhere.[a]

323. The above rule of succession applies in Bengal to every possible case, but, according to the Benares school, only where the family is divided.[b]

324. In Bengal even under the *Mitâxarâ* the daughter takes a more limited estate than the widow, but, under the *Mitâxarâ* in Southern India she seems to take a larger estate. Representation obtains among them, and they take as *heirs*. There is no authority in the Hindu Law books for the proposition that a daughter, inheriting from her father, takes a mere life-estate. The Courts, however, have followed the Bengal rulings.[c]

325. Where there are daughters by more wives than one, the estate vests in them equally, without regard to the mothers.[d]

troverts the notion. See also 4 Indian Jurist, 498. The daughter's connection with the *sapinda* though her son was the primary motive for her succession. Per *Muthusami Iyer*, J. in *Sivagungah* case.

a W. H. Macnaghten's Hindu Law, 21, 2nd ed.
2 Digest, 543, 3rd ed.

b W. H. Macnaghten's Hindu Law, 22, 2nd ed.

c See 14 Bengal Reports, 235; 4 Indian Law Reports (Calcutta), 744, and 2 Indian Appeals, 126.

d 6 Madras Reports, 310.

326. According to the law of Bengal and that of Benares, the daughters' sons inherit, in default of the qualified daughters. If there be sons of more than one daughter, according to the law of *Benares*, they take *per stirpes*. In Bengal, they take *per capita*.[a]

Daughters' sons.

327. Daughters' sons succeed, because, in regard to the obsequies of ancestors, as well as from consanguinity they are considered as sons' sons. Daughters' daughters do not inherit except in Bombay. And where there are daughters, sons cannot succeed, except as stated above.[b]

Daughters' daughters cannot inherit.

328. In Bengal if a maiden daughter should succeed to her father's estate in preference to her married sisters, and she should then marry, *her son succeeds to the property in preference to her married sisters and their sons*, these sisters having been married at the date of their father's death.[c]

Exception to the inheritance of daughters.

329. The succession stops with the son. If there be no son, the inheritance, on the death of the daughter, goes to those who would have succeeded, if it had never vested in the daughter. It does not

Inheritance stops with daughter's son.

a 1 Strange's Hindu Law, 124. Among daughter's sons, there was no ground of preference. *Per Muthusami Iyer* in *Sivagungah* case.

b 1 Ibid., 138, 139. A daughter's son is not a *grotaja sapinda*. *Mitâxarâ*, Chap. II, Sec. iii, § 6, citing *Manu*.
1 Morley's Digest, 258, 319, 325, 326.

c 6 Sutherland's Weekly Reporter, 147. *Sham Churn's Vyavastha Dapana*, 23, 147; *Dâya-bhâga*, Chap. II, § 30. This doctrine rests upon a text of *Çri Krishna Terkalankara* which in this respect seems to differ from the *Dâya-bhâga*. Its soundness is therefore questioned. A daughter's son becomes a fresh stock of descent.

class as *stridhana* and vest in the husband, at least it is so held in Madras and Bengal.[a]

Parents.

330. In default of the daughter's son, the inheritance ascends, and the mother succeeds as the nearest *sapinda*, and, after her, the father. This is the generally received law of the Benares school, though in Bengal the father inherits first, under the *Çraddh* theory, because he offers more oblations than the mother. According to the *Mitâxarâ*, the mother succeeds first, because, as being the nearest of the two parents, it is most fit she should take the estate.[b]

331. Step-mothers are excluded from the inheritance.[c]

332. The interest of the mother in the property is not absolute, that is, it is of a nature similar to that of the widow.[d]

a 1 Strange's Hindu Law, 139.
2 Madras Reports, 402.
14 Bengal Reports, 235.

b W. H. Macnaghten's Hindu Law, 25, 2nd ed. Of course she succeeds, like the widow and daughter, only when she is chaste.
4 Indian Law Reports (Calcutta), 550.
Mitâxarâ, Chap. II, Sec. iii, §§ 3, 5.
Manu, 9, 187.

c 1 Strange's Hindu Law, 144.
Mitâxarâ, Chap. II, Sec. iii, §§ 3, 5.
Manu, 9, 185. In Bombay the step-mother's claim appears to be favored, West and Buhler, 186.

d W. H. Macnaghten's Hindu Law, 25, 26, 2nd ed.
See also, 2 Madras Reports, 402, and 3 Ibid., 116.
8 Ibid., 91; 3 Indian Law Reports (Bombay), 353; 8 Moore's Indian Appeals, 500.

333. On failure of parents, the estate passes to the brother, or brothers of the deceased, those of the whole being preferred to those of the half blood; those of the half succeeding only on failure, or in default of those of the whole.[a] **Brothers.**

334. Generally, the brothers succeed on the ground of the benefits they confer by the offer of oblations, while the whole brother is preferred to the half, on account of his being the nearer *sapinda,* he of the half blood being remoter, as the son of a different mother.[b]

335. If the deceased lived in renewed co-parcenery with a brother, then, in case of all being of the whole blood, the associated whole brother is heir in the first instance; but on failure of him, the unassociated whole brother. So, in case of all being of the half blood, the associated half brother inherits in the first place, and on failure of him, the unassociated half brother. But if there be an associated half brother and an unassociated whole brother, then both are equal heirs.[c]

a 1 Strange's Hindu Law, 144.
Mitâcarâ, Chap. II, Sec. iv, §§ 1, 5, 6.
1 Indian Law Reports (Calcutta), 27. In Bombay *nephews* of the whole blood are preferred to *brothers* of the half. *Vyavahara Mayukha,* IV, 8, Sec. 16.

b 1 Strange's Hindu Law, 144, 145. Illegitimate brothers succeed each other.
Mitâcarâ, Chap. II, Sec. iv, § 5.

c 2 Strange's Hindu Law, 254.
1 Indian Law Reports (Calcutta), 27.
4 Indian Appeals, 147.

Sisters do not inherit.

336. Sisters are not enumerated in the order of heirs. This is Bengal law (a sister however may succeed a sister in Bengal); but it is not so under the *Mitâxarâ*. She may succeed in the absence of heirs. She may succeed her brother as a *bandhu*, but not as a *sapinda*. She may also object to alienations by her deceased mother in favour of a stranger. In Bengal however, she does not succeed a brother. In Bombay she does, (as also the half sister) and, according to the *Vyvahara Mayukha*, she is placed next in order after the paternal grandmother. In Bombay it has been held that after the death of a widow, her husband's sister succeeds as next heir before the sister's son, and sisters and daughters both take absolutely.[a]

Heritable pretensions of women not favored.

337. Generally speaking, the Hindu law is against the heritable pretensions of women. There are

a 2 Strange's Hindu Law, 243, 244, 246, Colebrooke, Ellis, and Sutherland.
1 Morley's Digest, 325, 326.
8 Madras Reports, 88. Mr. Mayne questions the soundness of this decision. He is of opinion that a sister is neither a *sapinda* nor a *bandhu* in the sense of the *Mitâxarâ*. The former being one who belongs to the same family, the latter one who is capable of performing funeral oblations—neither of which qualifications the sister possesses. 8 Madras Reports, 92.
11 Moore's Indian Appeals, 402.
14 Ibid., 196.
6 Indian Appeals, 32.
7 Sutherland's Weekly Reporter, 227.
5 Ibid., 215.
9 Moore's Indian Appeals, 516.
6 Bombay Reports, O. C., 1. It has recently been held in Bombay under *Mitâxarâ* law that the full sister and not the half brother succeeds a deceased brother. 3 Indian Law Reports (Bombay), 353; Ibid., 369.

however, four exceptions, viz., the widow, the daughter, the mother and the paternal grandmother, which are sanctioned by express texts.[a]

338. In default of brothers, their sons inherit in the same order, that is, those of the whole before those of the half blood, and the undivided before the divided.[b] **Brother's sons.**

339. There is this peculiarity in the succession of brothers' sons, viz., that a brother's sons, whose father died *after* the property had vested in him, claim by right of representation; they take *per stirpes* with their uncle, being, in that case, grandsons inheriting with a son: but where the succession devolves on the brothers' sons alone as nephews, they take *per capita.*[c]

340. In default of brothers' sons, their grandsons, and, after them, sisters' sons inherit. Brothers' daughters have no claim to the inheritance. In Bengal, however, it has been held that under the **Brother's sons and grandsons.**

a 4 Indian Jurists, III (*Sivagungah* case.)

b 2 Strange's Hindu Law, 254.
W. H. Macnaghten's Hindu Law, 27, 2nd ed.
Mitâxarâ, Chap. II, Sec. iv, § 7.
3 Sutherland's Weekly Reporter, 43.

c W. H. Macnaghten's Hindu Law, 27, 2nd ed.; 9 Sutherland's Weekly Reporter, 464; 15 Ibid., 70; 6 Ibid., 93. According to Sir T. Strange the right of representation does not subsist in the case of brother's sons. 1 Strange's Hindu Law, 145. But see 1 Indian Law Reports (Allahabad), 105. See *ante.*

Mitâxarâ all descendants in the male line who can offer funeral oblations may succeed.[a]

Heirs on failure of brothers' sons and grandsons.

341. On failure of brothers and brothers' sons, that is, of the father's descendants, the heirs are successively the paternal grandmother, the paternal grandfather, the uncles, and their sons and the father's sister's son. On failure of the paternal grandfather's line, the paternal great-grandmother, the great-grandfather, his sons, and their issue, inherit. These belong to the same general family, and are connected by funeral oblations. In Bengal, açcording to *Çri Krishna Terkalankara,* the grandfather and grandmother are placed at the bottom of the list of heirs.[b]

342. In Bengal on failure of the father's descendants in the male line down to the brother's grandson, the father's daughter's son succeeds, and after her, the father's son's daughter's son, and the father's grandson's daughter's son.

343. If there be none such, the succession devolves on remoter kindred, belonging to the same general family, and connected by libations of water.[c]

a W. H. Macnaghten's Hindu Law, 28, 2nd ed. Burnell's *Dâya-Vibhâga*, Sec. 40.
West and Bühler, 195.
6 Madras Reports, 280.
6 Sutherland's Weekly Reporter, 158; 14 Ibid., 208.
12 Moore's Indian Appeals, 448.

b 1 Strange's Hindu Law, 147, 148, citing *Çri Krishna Terkalankara.*
W. H. Macnaghten's Hindu Law, 33, 2nd ed.
Mitâxarâ, Chap. II, Sec. v.

c 1 Morley's Digest, 328.
Mitâxarâ, Chap. II, Sec. v, § 6.

344. Those of the lineal kindred who succeed next after the brothers' sons are called "*gotraja*" (*gentiles* of Roman law), indicating that they belong to the same general family. And they comprise the *sakulyas*, and the *samonadakas*.[a] Next in succession.

345. Where there are no lineal kindred, cognate kindred or *bandhus* succeed, that is, those who are sprung from a different family, and who, as such, offer no funeral oblations. They are connected through females.[b]

346. The relation of *sapindas*, extends to the seventh person, or sixth degree of ascent, or descent; that of the *sakulyas* to the fourth degree from the *sapindas;* and that of *samanodakas*, extends to the seventh degree beyond the *sakulyas;* or, as some affirm, it reaches as far as the memory of birth and name extends. This is signified by *gotra*, or the relation of family name.[c] Definition of Sapindas and samonadakas.

a W. H. Macnaghten's Hindu Law, 33, 2nd ed.
Mitâxarâ, Chap. II, Sec. v, §§ 1, 3; and Sec. vi. According to the spiritual theory the *sapindas* are those who offer the whole cake, undivided oblations; the *sakulyas* those who offer fragments of the cake, or divided oblations; and the *samonadakas*, those who offer libations of water. *Bandhus* are *bhinnagotra sapindas*.

b W. H. Macnaghten's Hindu Law, 33, 2nd ed.
Mitâxarâ, Chap. II, Sec. vi.

c W. H. Macnaghten's Hindu Law, 33, 2nd ed.
2 Digest, 568, 3rd ed.
Mitâxarâ, Chap. II, Sec. v, § 6. *Vijianeçwara* supposes the *sapinda* relationship to be based not on the presentation of funeral oblations, but on descent from a common ancestor, and in the case of females also on marriage with descendants from a common ancestor. All blood relations within seven degrees, together with the wives of the males amongst them are *sapinda* relations to each other. West and Bühler, 175.

347. The *sapindas* are sometimes divided into two classes, the nearer, and the remote. The former are the three in direct descent from the person to be traced from, and the three in ascent above him, and their descendants to the second degree. The rest are the remoter *sapindas*. The wife, daughters, daughters' sons, mother and paternal grandmother are included among the nearer *sapindas*.[a]

Definition of Bandhus.

348. The *bandhus* are of three descriptions: the personal, paternal, and maternal cognate kindred of the deceased. The personal kindred are the sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle. The paternal kindred are the sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle. His maternal kindred are the sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle.[b]

Heirs on failure of kin.

349. In default of natural kin, the series of heirs, in all the classes, terminates with the preceptor

a Strange's Manual, § 310.

b W. H. Macnaghten's Hindu Law, 33, 34, 2nd ed.

Mitâxarâ, Chap. II, Sec. vi. *Vijianeçwara* interprets the term *bandhu* as meaning relations within the *sixth* degree who belong to a different family. West and Bühler, 201. It is now held that the list of *bandhus* is not *exhaustive*, but *illustrative*, and any one is entitled to succeed, if he has the qualification of a *bandhu*, though not named.

5 Bengal Reports, 15.

12 Moore's Indian Appeals, 468.

of the deceased, his pupil, or his fellow-student, each in his order.[a]

350. In the case of the hermit *(vansprastha)*, the ascetic *(yati or sanyasi)*, and the professed student of theology *(brahmachari)*, who, in abdicating all worldly ties, lose their title as heirs to those to whom they are by nature related, their property descends among themselves, and not according to the general law of inheritance.[b] **Heirs of hermit, &c.**

351. Under the ancient Hindu law, primogeniture existed. Originally, the eldest son had preferential claims to the younger sons. *Manu* says, the eldest brother may take entire possession of the patrimony, and the others may live under him, as they lived under their father. And even at partition, a double portion was given to the eldest son, the best chattel was given to him, and the best room in the house, because, through him, the father discharges his debt to his ancestors.[c] **Primogeniture.**

a 1 Strange's Hindu Law, 148.
W. H. Macnaghten's Hindu Law, 34, 2nd ed.
2 Digest, 569, 3rd ed.
Collector of Masulipatam v. *Kavaly Vencata Narrainappa*, 8 Moore's Indian Appeal Cases, 500, 523.
Mitâxarâ, Chap. II, Sec. vii.

b 1 Strange's Hindu Law, 150, 151.
2 Digest, 577, 578, 3rd ed. The principle of succession upon which one member of an order of ascetics succeeds to another is based entirely upon the fellowship and personal association with the ascetic, and a stranger, though of the same order of ascetics, is excluded. 4 Indian Law Reports (Calcutta), 543.
Mitâxarâ, Chap. II, Sec. viii.

c 1 Strange's Hindu Law, 193.

352. This is now abolished, and primogeniture exists only in connection with the inheritance of Rajs or Principalities, large Zemindaries, and other impartible estates in the nature of Principalities. Primogeniture is, therefore, at the present day, an exceptional rule of inheritance.[a]

353. Primogeniture, however, where it exists, *must be proved to exist as a long and well established custom.* It will not be *assumed* to exist in connection with every impartible estate, as was done in the case of the *Sivagungah* Zemindary.[b]

Rights of sons by different wives.

354. In connection with the succession to a Zemindary, in which the rule of primogeniture prevailed, it has been decided that, as regards the rights of sons by different wives to inherit, except, perhaps, the son of the *first* wife, the priority in point of time of their mothers' marriages has never been regarded, when the wives were equal in caste and rank, and that the rule of primogeniture was and is the same in the case of sons by several wives of equal caste and rank, as in the case of sons by one wife.[c]

Succession by special family custom.

355. The succession to impartible estates may also be regulated by a special family custom, other

a 6 Madras Reports, 105.
7 Moore's Indian Appeals, 476.
9 Ibid., 539. Survivorship being an incident of joint ownership cannot apply to impartible estates. 12 Moore's Indian Appeals, 523. *(Tipperah Raj.)*

b 1 Bombay Reports, App., 42.
5 Ibid., Appeal Cases, 161. See Steele on Caste, *passim.*

c 3 Madras Reports, 75.
14 Moore's Indian Appeals, 570. This was the decision in the *Oordkad* Zemindary from the *Tinnevelly* District.

than that of primogeniture, *e.g.*, that of the *Tipperah Raj* in which it is the family custom *(Kulachar)* for the Rajah to name a *Jobraj* and a *Burrah Thakore*, of whom the former succeeds him and the latter becomes *Jobraj*.[a]

356. Where a custom is proved to exist, it supersedes the general law, which, however, still regulates all beyond the custom. And a claimant who fails to establish a title by family custom, must fall back on the general principles of law.[b]

357. By *Kulachar* or family custom also, an estate may remain impartible, and its descent regulated by the rule of primogeniture.[c]

358. There appear to be three classes of impartible estates : **Three kinds of impartible estates.**

First, the true ancient Raj, or Principality proper, whose characteristics are indivisibility, descent to a sole heir, and whose mode of descent is *almost universally* (though not necessarily, as in the case of the *Tipperah Raj* above noticed) according to *primogeniture:* examples of this kind are the *Tirhoot Raj* (12 Moore), the *Tanjore Raj* (7 Moore) and others.

Secondly, estates *in the nature* of a true Raj, or Principality, whose characteristics are indivisibility, descent to a sole heir, and whose mode of descent

a 12 Moore's Indian Appeals, 523.
b Ibid.
c 2 Indian Appeals, 263.

may be according to primogeniture, or by any *Kulachar*, or special family custom, or by the general Hindu law, male or female holding it, according as he or she may be the heir under the general Hindu law, the estate at the same time retaining its *impartible* character: examples of this kind are the *Naragunty* Polliem (9 Moore), and the *Sivagungah* Zemindary (Ibid).

Thirdly, estates which are impartible by *Kulachar*, or family custom, and whose characteristics may be as above. Such an estate, however, would be partible, if the members thought fit to divide it: example, the Taluq of *Gungore*, (2 Indian Appeals.)[a]

359. *Primogeniture* under *Hindu* law means a descent to the eldest *male* heir, lineal or collateral, and where this rule of descent prevails, no *female* can enter. It does not simply mean *seniority in age*, as is sometimes understood, it implies that the heir must be a *male* as well.[b]

Rule of descent by primogeniture.

360. When this rule of descent prevails, the estate descends to the eldest son, and at his death to his eldest son, if he have left male issue, the descent in each case being to the eldest son, and on the failure of the male issue of such son, to the next son

a *Raj Kishen Singh* v. *Ramjoy Surma Mazoomdar*, (Privy Council), cited in 2 Indian Appeals, 263.

b 9 Bengal Law Reports, 274.
5 Moore's Indian Appeals, 100, 169.
6 Ibid., 164.
7 Ibid., 476.
12 Ibid., 1
Sir Henry Maine's Ancient Law, Chap. VII, 4th ed.

and his male issue; and on the failure of all the sons and the male issue of such sons, to the next male collateral and his male issue; and on the failure of collateral males, the estate will escheat to the Crown, as it did in the case of the *Tanjore Raj*, (7 Moore), but this may be avoided by the adoption of a son, as was frequently done in the *Rawutpore Raj*, (5 Moore). The descent in the case of the latter Raj is a very good example of descent by primogeniture.[a]

361. The descent to a sole heir by primogeniture does not interfere with the general rules of succession further than to vest the possession and enjoyment of the *corpus* of the whole estate in a single member of the family, subject to the legal incidents attached to it, as the heritage of an undivided family, (where the estate belongs to an undivided family), that being all that the purpose of the usage, viz., the preservation of the estate as an impartible Raj renders necessary. The unity of the family right to the heritage is not dissevered any more than by the succession of co-parceners to partible property; but the mode of its beneficial enjoyment is different. Instead of several members holding the property in

a 9 Moore's Indian Appeals, 446. Under the rule of primogeniture the estate passes in the line of the eldest son in preference to collaterals. So that if the eldest son die, leaving no son, but a grandson, the latter will take before his uncle. As to claims by collaterals, see 5 Indian Appeals, 61. There seems to be some conflict of opinion as to the rule of primogeniture. In the *Tipperah* case the Privy Council held that the descent was to be tried from *the last male holder* and that the *eldest* of *his nearest* heirs should succeed. In such a case a collateral might succeed in preference to a grandson. 12 Moore's Indian Appeals, 523.

common, one takes it in its entirety, and the common law rights of the others, who would be co-parceners of partible property, are reduced to rights of survivorship to the possession of the whole, dependent upon the same contingency as the rights of survivorship of co-parceners *inter se* to the undivided share of each; and to a provision for maintenance in lieu of co-parcenery shares.[a]

362. Descent by primogeniture is not a necessary incident to an impartible estate; but where primogeniture holds as a rule of descent, the estate must necessarily be impartible.

a 6 Madras Reports, 105.

9 Moore's Indian Appeals, 539.

It seems indeed curious how the general Hindu Law of inheritance came to be applied *at all* to impartible estates. Generally speaking the descent of an impartible estate is by *primogeniture*, which is an *exceptional* rule of inheritance. We have therefore, according to the rulings of the present day, an impartible estate descending by an exceptional rule of inheritance, and at the same time according to the general Hindu Law. This appears anomalous. If an estate descends according to the strict rule of primogeniture, which by analogy and according to the authorities means a descent to the eldest *male*, then the estate will and must always retain the incident of impartibility. If the general Hindu Law once attaches to these impartible estates, it seems inevitable that the estate at some time or other must become partible, as was contended in the *Sivagungah* case. The Courts themselves seem to recognise this principle now. In the case of the *Nuzwid* Zemindary, in the *Guntur* District, the Privy Council held it to be partible, though the Madras High Court decided that it was an ancient and impartible estate. The Zemindary in question, however, had been carved out of a larger estate and a fresh *sunnud* granted to the holder. The word "heirs" in the *sunnud* was held to mean the heirs of the grantee according to the ordinary law of inheritance and the estate was considered partible. 4 Indian Jurist, 138. In the recent *Sivagungah* case Mr. Justice *Innes*, differing from the rest of the Court, held that the Zemin-

363. Where an impartible estate is the *self-acquisition* of the last holder, it will descend to his *lineal* heirs first, and not by *survivorship*, as was decided in the *Sivagungah* case.[a]

Descent of self-acquired Zemindary.

364. Some portion of the family estate may be impartible, and the rest governed by the ordinary law of inheritance. The private property of a Zemindary, consisting of movables and land not appurtenant to the Raj, would come under the latter description and would be liable to partition when demanded.[b]

Impartible and partible estates may co-exist in same family.

365. In the case of the *Sivagungah* Zemindary, it was held that, where an impartible estate descends to daughters as a class, it will on the death of the last daughter pass to the *eldest* son of a daughter alive at the time *under the rule of primogeniture*, in preference to the son of the last holder.[c]

Descent of Zemindary to daughters as a class.

366. The existence of proprietary estate in *Polliems*, or other lands not permanently assessed, and the tenure by which it is held, are matters to be judicially determined on the evidence in each case.[d]

Evidence as to estates of inheritance in Polliems, &c.

dary was partible property. There is no reason indeed why any impartible Zemindary should not be divided *with the consent of the heirs.*

a 9 Moore's Indian Appeals, 539.

b 5 Madras Reports, 31.
7 Moore's Indian Appeals, 46.

c 6 Madras Reports, 310.

d 6 Ibid., 227; 8 Madras Reports, 114; 1 Indian Appeals, 268, 282.

367. Proof of possession, or receipt of rents by a person who pays the land revenue immediately to Government, is *primâ facie* evidence of an estate of inheritance in the case of an ordinary Zemindary. The evidence is still stronger if it be proved that the estate has passed, on one or more occasions, from ancestor to heir.[a]

Escheat.

368. Where a man of whatever caste dies *without heirs*, and without having alienated his property, it passes to the Crown by escheat.[b]

369. Where property has escheated to the Crown, it has the right to impeach an unauthorised alienation by a widow, in the same way as *reversionary* heirs might.[c]

370. A lawful charge upon escheated property, or trust, will bind the Crown.[d]

Heirs to a woman's *Stridhana*.

371. The above relates to inheritance among males. As to *Stridhana*, or woman's separate property, it is not governed by the ordinary rules of inheritance. It is peculiar and distinct, and the succession to it depends upon the *form of marriage*,

a. 6 Madras Reports, 227; 8 Ibid., 114; 1 Indian Appeals, 268, 282.

b 8 Moore's Indian Appeals, 500; 11 Ibid., 619; 12 Ibid., 448; 3 Indian Appeals, 92. In this case it was held that a large Zemindar could not claim as *escheat* a small Zemindary originally carved out of the larger estate, in preference to the Crown.

c 8 Ibid., 529.

d 11 Ibid., 619.

The superintendence of escheats vests in Board of Revenue under Regulation 7 of 1817.

the *source* from which it has been derived, or the *time* when it was *acquired.*[a]

372. Where it belongs to an *unmarried* female, with exception of a nuptial present, (which, where it exists, reverts on her death to the bridegroom), her *Stridhana* goes first to her *uterine* brothers, whom failing, to her parents in succession, the mother taking before the father. In default of parents, it goes to their nearest relations.[b]

373. Where it belongs to a *married* woman, whether she die, living her husband, or a widow, the immediate heirs to it, including personalty inherited from her husband, are her lineal descendants in the female line, whether daughters or granddaughters, the granddaughters taking *per stirpes;* the unmarried and unendowed of the one, or the other, taking first.[c]

a 1 Strange's Hindu Law, 249, 250.
W. H. Macnaghten's Hindu Law, 37, 2nd ed. Generally speaking a woman's *Stridhana* may be divided into *Çulka*, *Yautaka* and *Ayautaka.*

b 1 Strange's Hindu Law, 249.
W. H. Macnaghten's Hindu Law, 38, 2nd ed. West and Bühler, 523; *Mitâxarâ*, ii, 11, Secs. 29, 30.
2 Digest, 618, 619, 3rd ed. *Dâya-bhâga*, iv, 3, Sec. 7. With regard to a maiden's ornaments as well as property inherited, the *Mitâxarâ* says her uterine brothers shall have the ornaments for the head and other gifts which may have been presented to the maiden by her maternal grandfather (or her paternal uncle) or other relations, as well as the property which may have been regularly inherited by her. *Mitâxarâ*, ii, 11, Sec. 30.

c 1 Strange's Hindu Law, 51, 249.
W. H. Macnaghten's Hindu Law, 38, 39, 2nd ed.
Mitâxarâ, Chap. II, Sec. xi, §§ 9, 12, 13, 18, 19.

374. Where there are both daughters and granddaughters, it vests in the daughters exclusively, subject to such a provision for granddaughters as usage may warrant. In Bengal the granddaughters get no share. Daughters take equally, subject to the above distinction of married and unmarried. Failing female issue, daughters' sons' sons and grandsons succeed. These also take *per stirpes.*[a]

Descent according to form of marriage.

375. In default of all issue, the succession varies according to circumstances. The marriage having been in an approved form, *(Brahma, Daiva, Arsha, Prajapatya)*, the husband (surviving) and his kin successively, are heirs; if in any of the less approved ones, *(Asura, Gandharva, Rakshasa, Paisacha)*, the parents of the woman succeed. On failure of them, their next of kin take the succession.[b]

Wife's fee, or *Çulka.*

376. The wife's *fee* or *perquisite (Çulka)*, given to her in the bridal procession, descends, by way of exception, to her brothers of the whole blood, and in default of them to the mother.[c]

Descent of property given at nuptials and property not so given.

377. Some distinction has been drawn as to the course of inheritance with reference to what was given by a woman's father, but not at the time of the nuptials, and what was so given. But

a See authorities last cited.

b 1 Strange's Hindu Law, 250.
2 Digest, 614, 615, 616, 624, 625, 3rd ed.
Mitâxarâ, Chap. II, Sec. xi, §§ 10, 11.

c 1 Strange's Hindu Law, 51.
2 Digest, 619, 3rd ed.
Mitâxarâ, Chap. II, Sec. xi, § 14.

this distinction does not appear to be generally observed.[a]

378. Ornaments, and gifts *(Yautaka)* to a woman by her husband, or some of her relations on, before, or connected with her marriage, are her *Stridhana*, and descend to her heirs, that is to her daughter's son. But those not so given, and worn by her occasionally, are her husband's property, and are descendible to his heirs; although, if they were habitually worn by her, they would be considered her property, habitual wear, says *Jagannatha*, being considered as a mode of acquisition. This property corresponds to a lady's *paraphernalia* under English law. Gifts made subsequent to marriage by the woman's or her husband's family *(Ayautaka)* have the same course of descent.[b]

Descent of a woman's ornaments or *yautaka*.

379. In the line of heirs, the daughter's husband is preferred to the sister; but would be postponed, if the latter had a son, the sister's son being first heir, after the husband, in the case of a woman's separate property.[c]

Daughter's husband preferred to sister.

a W. H. Macnaghten's Hindu Law, 39, 40, 2nd ed.
See Table of Succession, *post*.

b 1 Strange's Hindu Law, 50, 211. See Table *post*. A general definition of *Yautaka* is gifts given at the nuptials in opposition to gifts subsequent *(Ayautaka)*. The *Mitâxarâ* makes no difference between the descent of *Yautaka* and *Ayautaka*. Some writers of the Benares school however do.
2 Ibid., 55, Colebrooke.
Manu, IX, v. 200.
2 Digest, 592, 3rd ed.
Mitâxarâ, Chap. I, Sec. iv, § 19. See *ante* Chap. II.

c 2 Strange, 403, Colebrooke citing *Smṛti Çandrika* and *Madhaviya*.

A widow's maintenance not *Stridhana*.

380. Maintenance allowed to a widow does not pass at her death to the heirs of her *Stridhana*, but to her husband's heirs. Gift of money, however, by a son to his mother has been held to be *Stridhana*.[a]

No difference between Benares and Bengal schools as to heirs to *Stridhana*.

381. There is no material difference between the Benares and the Bengal schools, as to the order of heirs to a woman's *Stridhana*. The distinctions that do exist are somewhat nice, and therefore unimportant.[b]

Unchastity does not prevent inheritance of *Stridhana*.

382. Unchastity in a woman does not incapacitate her from inheriting *Stridhana*: nor does it preclude her from keeping possession by right of inheritance of *Stridhana*.[c]

Descent of property amongst prostitutes.

383. The trade of prostitution being recognized and legalized by Hindu law, the law of inheritance amongst professional prostitutes, as indeed among prostitutes generally, is the same as that amongst other Hindu females, that is, their offspring, natural or adopted, succeed, the female being preferred to the male.[d]

384. Prostitute daughters, living with their prostitute mothers, succeed to their mother's property, in preference to a married daughter, living with her husband.[e]

a 2 Strange, 404—406, Colebrooke, Ellis, and Sutherland; 5 Sutherland's Weekly Reporter, Miscellaneous, 53.

b W. H. Macnaghten's Hindu Law, 40, 41, Note, 2nd ed. See Table.

c 1 Indian Law Reports, (Allahabad), 46.

d 2 Madras Reports, 56.
Ibid., 196.

e Ibid., 56.
Morley's Digest, N. S., 186.

385. It has been held that the undegraded relatives, whether offspring, or other, of a prostitute, cannot inherit her property. This, however, seems doubtful, even according to Hindu law. Further, a prostitute's right of inheritance is secured to her by specific legislation (Act XXI of 1850), and there seems no reason, therefore, why her undegraded relatives cannot inherit to her, if she can inherit to them.[a]

Order of succession to ancestral property in a divided family (Madras).

Son (natural or adopted).
Grandson.
Great-grandson.
Widow.
Daughter. Unmarried first, then married, and among these, the unendowed before the endowed.
Daughter's son.
Mother, but not step-mother.
Father.
Brother, whole blood first, then half.
Brother's sons do.
Brother's grandsons do.
Paternal grandmother.
Do. grandfather.

[a] Morley's Digest, N. S., 186; 2 Madras Reports, 56. See, however, 3 Madras Reports, 50, citing the *Vyavahara Mayukha*, the *Dâyabhâga*, and the *Mitâxarâ*.

Paternal grandfather's sons (uncles), whole first, then half.

Paternal grandfather's grandsons (cousins) do.

Do. grandfather's great-grandsons.

Do. great-grandmother.

Do. great-grandfather.

Do. great-grandfather's son, and grandson successively.

Do. great-grandfather's great-grandsons.

Then the *sakulyas* in the same order, to the fourth degree from the *sapindas*. In default of *sakulyas*, the *samanodacas* succeed. These are reckoned in the same order, as far as the seventh degree from the *sakulyas*. The above is the order in which each class succeeds direct from the *propositus*, not the order in which each succeeds the other. When an heir obtains property, the descent must be traced afresh from him. In default of these, the *bundhoos* or cognates succeed.[a]

386. There is some difference in the order of succession between the Madras, and other schools, chiefly Bengal. This may be accounted for from the fact that, a greater number of females are admitted as heirs under the *Mitâxarâ*, in which the doctrine of *consanguinity* over-rides that of *spiritual benefit*, which prevails in the other schools, chiefly in that of Bengal. The leading rule of inheritance under the *Mitâxarâ* is the text of *Manu*: To the nearest *sapinda* the inheritance belongs.

a W. H. Macnaghten's Hindu Law, 34.

Order of succession to Stridhana (Madras).

Of unmarried woman:

Bridal ornaments to be returned to the betrothed husband.

Brother whole first, then half.

Mother.

Father.

Her paternal kinsmen in due order.

Çulka. — *Çulka* of married woman goes to uterine brothers.

Yautaka and Ayautaka. — Of married woman given at time of nuptials.

Daughters including granddaughters, unmarried, then married, and among these unendowed before endowed,—unendowed are such as are destitute of wealth, or without issue. The barren and widows failing the two first succeed as co-heirs.

Daughters' sons.

Sons.

Grandsons.

Yautaka and Ayautaka. — If marriage of approved form:

Husband.

Brother whole first, then half.

Mother.

Father.

If marriage of a disapproved form:

Mother.

Father.

Brother whole first, then half.

Husband.

Yautaka and Ayautaka.

In default of these the order is as follows :—

Son of mother's sister.
Son of maternal uncle's wife.
Son of paternal uncle's wife.
Son of father's sister.
Son of mother-in-law.
Son of elder brother's wife.[a]

CHAPTER VII.

DISABILITIES TO INHERIT.

Grounds of exclusion.

387. EXCLUSION from inheritance rests in general upon the same principle with succession to it, that is, it is connected with the obsequies of the deceased; from their incapacity to perform which the excluded are incompetent as heirs.[b]

388. The causes of it are sufficiently numerous; defects both of body and mind, and devotion to any of the religious orders.[c]

a Step-children do not take under the *Mitâksharâ*. They do in Bengal. W. H. Macnaghten's Hindu Law, 39, 40, *et seq.* Macnaghten says with reference to the order of succession to *Stridhana* that it does not vary materially in the different schools; except that (as in the case of succession to ordinary property) a distinction is made by the law of Benares and other schools between wealthy and indigent daughters.

b 1 Strange, 152.

c 1 Strange, Chap. VII.
Mitâksharâ, Chap. II, Sec. x.
The orders are—1, the professed student; 2, the hermit; 3, the ascetic.

389. Hence idiots and madmen; the deaf, the dumb, and the blind, that is, those deprived of any one of the faculties of hearing, speaking, seeing; the lame, that is, those who cannot walk on either foot, or who have lost both hands and the impotent; those suffering from obstinate or incurable disease, as well as devotees, are excluded from the inheritance.[a]

Disqualified heirs entitled to maintenance.

390. Disqualified heirs are entitled to maintenance.[b]

Third issue however succeed.

391. The sons, however, or the grandsons and great-grandsons of the disqualified person succeed to the inheritance in default of each other.

392. In Bengal it was held that a deaf and dumb father could not inherit to the grandfather, and that the grandson, born after the grandfather's death, could not succeed to the grandfather's estate. This ruling does not apply to the case of the son of an excluded person, if having been begotten and being in the womb at the time of the ancestor's death, he is afterwards born capable of inheriting.[c]

a 1 Strange, Chap. VII. 14 Bengal Reports, 273; 1 Indian Law Reports (Bombay), 177, 557.
2 Digest, 435, *et seq.* 3rd ed.
Mitâxarâ, Chap. II, Sec. x, § 2, and Note. In cases of disease, the strictest proof will be required. Generally speaking defects must be *congenital*. The mere fact of a person calling himself a devotee will not disentitle him. 1 Sutherland's Weekly Reporter, 209; 2 Sutherland's Weekly Reporter, 125.

b 1 Strange's Hindu Law, 174.

c 2 Bengal Reports, (Full Bench Rulings), 103.
See also 1 Ibid., A. C., 117.

Vice generally speaking not a ground of exclusion.

393. Under Hindu law, vice, (which includes fraud), constructive as well as actual, is considered a disqualifying cause, since in some instances it even excluded from caste. Generally speaking under Hindu law, as administered at the present day, vice is no disqualification.[a]

394. Unchastity in a woman however debars her right of inheritance. Act XXI of 1850 would not remove the bar.[b]

395. Unchastity alone is not a ground for *devesting* an estate after it had once vested: unchastity coupled with degradation from caste may be. *Peacock*, C. J. observed that the estate taken by a Hindu widow by inheritance is not an estate only so long as she continues chaste, or an estate liable to be forfeited by an act of unchastity. If this were so, he held that a widow would be in a worse position than a wife, since a wife may inherit if her offence is expiated before the death of her husband; but if a widow's estate cease, expiation would not restore it. Act XXI of 1850 removes the disability from degradation.[c]

Effect of Acts XV of 1856 and XXI of 1850.

396. Under Act XV of 1856, a widow may re-marry, but she loses her right to inherit, or to be maintained out of her husband's property. Under Act XXI of 1850 she may lead the most immoral

a *Mitâxarâ*, Chap. II, Sec. x; 1 Indian Law Reports (Bombay), 559.
3 North West Reports, 267.

b 5 Bengal Reports, 466.
13 Ibid 1, 25, 75; 4 Bombay Reports, 25.

c Ibid.

life, be degraded from caste in consequence, and yet secure all the benefits of inheritance.

397. It has been held in Bengal that under Act XV of 1856, a widow on her re-marriage loses only *vested* rights of inheritance, and not those which have not accrued. She might succeed to the estate of her son who died after his mother's re-marriage, and who had succeeded to her first husband's estate.[a]

A dumb widow cannot inherit.

398. A dumb widow cannot inherit from her husband when the dumbness is congenital, but she must be maintained, and is capable of possessing *Stridhana.*[b]

Definition of term idiot.

399. According to the *Mitâxarâ*, an idiot is a person deprived of the internal faculty, meaning one incapable of discriminating right from wrong.[c]

400. It has been held, however, that the mental incapacity which disqualifies a Hindu from inheriting, on the ground of idiotcy, is not necessarily utter mental darkness.[d]

401. A person of unsound mind, who has been so from his birth, is, in point of law, an idiot; such unsoundness is to be determined not upon wire-drawn speculations, but upon tangible and unmistakable facts.[e]

a 2 Bengal Reports, A. C., 199.
b 4 Bombay Reports, A. C., 135.
c *Mitâxarâ*, Chap. II, Sec. x, § 2.
d 1 Madras Reports, 214.
e Ibid.

Reason of disqualification.

402. The reason for disqualifying a Hindu idiot is his unfitness for the ordinary intercourse of life.[a]

Defects should be coeval with birth.

403. The other defects of body and mind enumerated must be co-eval with birth, with the exception, perhaps, of madness and impotence. For in practice, the succession of one who becomes deaf, blind, &c., in the course of his life, occurs even though such defect be incurable.[b]

Maladies how regarded.

404. Maladies, if extreme, are regarded as an expression of the divine displeasure at vice and crime indulged and perpetrated in a prior form, which it remains for the actual sufferer to expiate, forfeiting in the meantime his succession.[c]

405. With regard to leprosy the late Sudr Court at Madras held that, it is a fact well known in medical science that the disease of leprosy assumes in some cases a mild and curable form, while in others it appears in a virulent and aggravated type. The Sudr Court find, on consulting the best authorities on the subject, that it is in the latter case only that the disease is regarded in Hindu law as a disqualification entailing forfeiture of inheritance.

a 1 Strange's Hindu Law, 152.
See also above decision.

b 1 Strange's Hindu Law, 153.
2 Digest, 435, *et seq.* 3rd ed.
14 Bengal Reports, 273; 9 Ibid., 198; 13 Moore's Indian Appeals, 519; 14 Ibid., 176.

c 1 Strange's Hindu Law, 155.

This doctrine was approved by the High Court of Bombay.[a]

406. If the disqualifying cause be removed by medicaments, or other means, the right to inherit takes effect. If this happens after division, the person succeeds by analogy to the case of the son born after partition.[b] **Where defect is removed.**

407. In every case of exclusion, the son or other heir must be in the same predicament as the delinquent himself, in order to bar his inheritance.[c] **Heir must be in same predicament as delinquent to bar inheritance.**

408. In general, the law of disqualification applies alike to both sexes.[d] **Law of disqualification applies to all.**

409. An adopted son may be disinherited for like reasons as the legitimate son, but he cannot forfeit the relation of son.[e]

410. The doctrine of Hindu law, that out-castes are incapable of inheritance, has no bearing upon the case of the members of new families, which have sprung from persons so degraded.[f] **Non-application of rule in certain cases.**

a Madras Sudr Reports, 1860, 238.
5 Bombay Reports, A. C., 145.

b 1 Strange's Hindu Law, 164.
Mitâxarâ, Chap. II, Sec. x, § 7.
2 Bengal Reports (Full Bench Rulings), 103. Nor will any subsequent disqualification devest an estate already vested. West and Bühler, 272.

c 1 Strange's Hindu Law, 163.

d Ibid., 164.
2 Bombay Reports, 5.

e 2 Strange's Hindu Law, 126, Colebrooke.
As to exclusion of unchaste wives and illegitimate sons, see Chap. on Inheritance.

f 3 Madras Reports, 50.

Estate once devested will not revert.

411. If the estate has once vested in a remoter heir in consequence of the disqualification of the nearer heir, it will not devest on the removal of the disqualification, or in consequence of the subsequent birth or conception of a son of the disqualified heir.[a]

412. As to the exclusion of illegitimate sons, such are only excluded when they are the issue of adulterous or incestuous intercourse.[b]

Incompetent marriage another cause of exclusion.

413. Another cause of exclusion stated in the books is an *incompetent marriage*, that is, where the husband and wife are descended from the same *stock*. Such a marriage being incongruous, the issue of it cannot inherit excepting among *Çudras*. And the consequence is the same where the marriage has not been according to the order of *class*. But cases of this sort do not appear to have arisen in any of the courts; nor indeed does it seem to be taken as a ground of objection in the present day.[c]

CHAPTER VIII.

CHARGES ON THE INHERITANCE.

Charges on the inheritance.

414. The charges to which the inheritance is liable, are of three kinds: *First*, debts and other

a 2 Bengal Reports (Full Bench Rulings), 103. Nor will such heir succeed, if he be not the *next* heir to the person in possession. 10 Moore's Indian Appeals, 279; 1 Bengal Reports, A. C., 117.

b 2 Madras Reports, 293.
3 Ibid., 134.

c 1 Strange's Hindu Law, 165.

obligations in the nature of legacies. *Secondly*, certain specific duties to be provided for out of it, where it has descended to a single heir, and out of the common fund, where it has vested by survivorship in undivided parceners, such as the providing for the initiatory and marriage ceremonies of the members of the family. *Thirdly*, maintenance of all requiring and entitled to it.[a]

415. The rule as to the discharge of debts is, that they follow the assets into whosoever hands they come, the obligation to pay attaching, not upon the death only of the ancestor, but on his becoming an anchorite, or having been so long absent from home as to let in a presumption of death. Where there are no assets, there is no liability.[b] **Rule as to discharge of debts.**

416. A man's private debts (in opposition to family debts) must be paid by him who inherits, either his separate, or self-acquired property.[c]

a 1 Strange's Hindu Law, 166. Debts always take precedence of other charges. 1 Indian Law Reports (Calcutta), 365.

b Ibid.
See further Chapter on Guardianship.
See also 3 Madras Reports, 161; 10 Bombay Reports, 361.
11 Ibid., 76. Bombay Act VII of 1866. Where the property has passed into the hands of a *bonâ fide* purchaser for value of course it cannot be seized by the creditor. 1 Bombay Reports, 116; 12 Ibid., 78.

c Ibid., 6 Moore's Indian Appeals, 421.
It is now settled that the undivided share of a co-parcener may be sold in execution of a decree obtained by the creditor. 4 Indian Appeals, 247. Where the debtor, however, dies before judgment the creditor has no rights against the property in the hands of the co-parceners, if the debt is the *separate* debt of the deceased. 2 Indian Law Reports (Bombay), 479; 4 Indian Appeals, 253. If the debt is a *family* debt, the family property is liable and so are the co-parceners jointly and severally.

417. This obligation is inculcated upon the heir as of importance to the peace of the deceased, equally with the performance of his funeral ceremonies, the two together constituting the true consideration for inheritance.[a]

When a debt is binding on the heirs.

418. To be binding, a debt must have been incurred on a good consideration. This excludes such as have arisen from gaming, and such as have been recklessly incurred, *and not for the benefit of the family.*[b]

Qualification of the rule.

419. It does not follow that because the ancestral estate has been encumbered, that the sum borrowed has been a wasteful expenditure. It may well be that the managing member has obtained by it something much more valuable than the original estate.[c]

420. All that is necessary is that the speculations of a managing member should be entered into with the *bonâ fide* hope and reasonable expectation of increasing his property for those who are to come after him, and then his co-parceners will be also liable for the losses he may sustain.[d]

Power of manager.

421. In cases of trade, the manager has the power to pledge the property and credit of the family, and minors and other members of the family

a 1 Strange's Hindu Law, 166.

b Ibid., 166, 167; 1 Indian Appeals, 321; 1 Indian Law Reports (Bombay), 262; 2 Ibid., 498; 2 Indian Law Reports (Calcutta), 213. A private debt of a co-parcener will not bind the family. 1 Indian Law Reports (Madras), 354.

c 3 Madras Reports, 177.

d Ibid.

will be bound by all acts of the manager, which are incident to the carrying on of the trade. Unless the manager had this power, the family trade could not be carried on, for the acts of the manager might be set aside by the minor.[a]

422. Where self-acquired property has descended burdened with any debts, the estate is in the hands of the heirs liable for those debts, nor will it be discharged on the ground that, the managing member ought to have paid the debts.[b]

Self-acquisition liable for debts.

423. The passage in the *Mitâxarâ* as to the right of sons to prohibit excessive expenditure by no means involves the logical consequence that, if that right of prohibition has not been, or, from the nonage of the sons, could not have been exercised, there would be after the lapse of any period, how long soever, a right of restitution. It may be that the case of a minor requires a different consideration; the law counter-balances his disabilities with many privileges, and it may well be that he might be entitled to restitution, although a son of full age would not be. But it may also be that, the absence of the power of interposition would be a loss attendant upon his disability, from which no law could relieve him.[c]

Meaning of passage in the *Mitâxarâ*.

a 1 Bombay Reports Appendix, 61.
Ibid., A. C., 27; 1 Indian Law Reports (Calcutta), 275; 6 Moore's Indian Appeals, 393.

b 3 Madras Reports, 177.

c Ibid.

How payment of debts provided for.

424. The course for the payment of debts on partition may be either by disposing of a sufficient part of the property for the purpose, and thus paying them off at once, or by apportioning them among the parceners, according to their respective shares, an arrangement which, to be binding upon creditors, would require their assent.[a]

Gifts.

425. Gifts made by a man during his life-time to take effect after his death are a charge upon the inheritance: and, according to *Devala*, that which a husband has promised to his wife for separate property must be made good by his sons even as a debt.[b]

Çraddhas.

426. The exequial rites *(Çraddhas)* of a deceased individual, namely, his monthly, six-monthly, and annual ceremonies, are to be paid for out of the estate.[c]

Initiation and marriage.

427. Not less obligatory upon the heirs is the charge for the *initiation* of the uninitiated, and the *marriage* of the unmarried members of the family.[d]

What constitutes initiation.

428. Initiation involves a succession of religious rites attended with more or less of expense; commencing with purification and terminating in mar-

a 1 Strange's Hindu Law, 168. Particularly religious gifts. See *post* Chapter in Trusts.
2 Ibid., 283, 284, Colebrooke.
See further Chapter on Partition, *post*.

b Strange's Hindu Law, 169.
Vyavahara Mayukha, Chap. IV, Sec. x, § 4, citing *Devala*.

c 1 Strange's Hindu Law, 170.

d Ibid.

riage. They are ten in number; of which marriage is the only one competent to females and *Çudras;* the rest being confined to males of the three superior classes.[a]

429. The duty of initiating attaches to those who have themselves been initiated; and the provision for it is to be made before partition out of the common stock.[b]

Duty of initiation to whom attaches.

430. Charges of this nature to be available against the inheritance must be reasonable; though this is seldom attended to. They regard brothers and sisters only, not extending to collaterals.[c]

Charges of initiation, &c., to be reasonable.

431. Of course, when the family is undivided, sons, grandsons and great-grandsons must be maintained out of the estate as well as the other members; and the same duty attaches to each partner after division with reference to the members of his own family, his own family then being in a state of undivision. Where there is no ancestral estate, they are not entitled to maintenance after they have attained majority. This applies also to adopted sons.[d]

Charges in undivided family.

432. As already observed, the widow, where she does not inherit, must be maintained by the heir. It is a charge upon the whole estate, and therefore upon

Widow to be maintained where she does not inherit.

a 1 Strange's Hindu Law, 170.
b Ibid.
c Ibid., 170, 171.
d 1 Madras Reports, 45; 4 Bengal Reports, Appendix, 23. 12 Sutherland's Weekly Reporter, 494.

any part thereof. It may be supplied by an assignment of land, or an allowance of money; in either case proportioned to her support, and that of those dependant upon her, including the performance of charities and the discharge of religious obligations; and this always with a reference to the amount of property, so as at the utmost not to exceed a son's or other parcener's share. This is also the law in Bengal.[a]

433. In Bomby it has been held that a destitute widow must be maintained by her husband's relations, although she may have shared her husband's estate and supported herself for a long time by trading.[b]

434. It has been held that the heir cannot turn out the widow and others entitled to maintenance from the family dwelling-house, and that these may

a 1 Strange's Hindu Law, 171.
The amount of maintenance will depend upon the facts of each case. In allotting it a woman's *Stridhana* must be considered. The claim for maintenance only lies where the person against whom it is claimed possesses any of the property from which it is claimed. 9 Bombay Reports, 283.
24 Sutherland's Weekly Reporter, 474.
2 Indian Law Reports (Bombay), 573.
Ibid., 632. Nor will a claim for maintenance bind the lands in the hands of a *bonâ fide* purchaser for value without notice unless there was a decree making the property liable. 2 Indian Law Reports (Bombay), 494.
1 Ibid., (Calcutta), 365. Nor would any other charges be binding.
2 Strange's Hindu Law, 305, 307, 383, Colebrooke.
4 Bombay Reports, 273.
Ibid., A. C., 73.

b 1 Bombay Reports, 13.
9 Sutherland's Weekly Reporter, 475.

remain in the dwelling-house and claim maintenance from the estate, even though they have passed into other hands.[a]

435. A brother's widow must be maintained by her husband's brother on his succeeding to the estate.[b]

436. A woman forfeits her right to maintenance if she leaves the protection of her legal guardian without sufficient cause.[c]

437. A widow's right to maintenance is *personal*. It cannot be alienated nor can she alienate lands charged with her maintenance.[d]

Widow's right to maintenance *personal.*

438. Where the widow succeeds as heir, she takes subject among other things to defray the education and nuptials of an unmarried daughter;

Liabilities of widow succeeding.

a 4 Bengal Reports, O. C., 81.
15 Sutherland's Weekly Reporter, C. R., 263.
17 Ibid., 433.
1 Agra Reports, 42.

b 10 Sutherland's Weekly Reporter, 359.

c 1 Madras Reports, 372.
4 Sudr Dewanny Decisions (Bengal), 491.
6 Sutherland's Weekly Reporter, 116.
9 Ibid., 413.
Ibid., 152. But see 5 Madras Reports, 150, and 2 North-West Reports, 170.
2 Indian Law Reports (Bombay), 634. A widow however is not bound to reside in the family house. 12 Bengal Reports Privy Council case, 238; 3 Indian Law Reports (Bombay), 372.
If the husband directed by will that she should live in the family house, she would have to do so to obtain maintenance. 12 Bengal Reports, 247.

d 5 Sutherland's Weekly Reporter, 111.
3 North-West Reports, 324.

—as also to maintain those whom the deceased was bound to support.[a]

Claim of adulterous wife, &c.

439. A wife leaving her husband's house without sufficient cause, and an adulterous wife, are not entitled to maintenance, but may claim, under certain circumstances, *a bare subsistence.*[b]

440. A wife however does not permanently forfeit her right to maintenance by leaving her husband's house, or for any ordinary fault. If she returns to her husband after leaving him, he is bound to maintain her.[c]

Grandmother and stepmother to be maintained.

441. The grandmother forming a part of the family, is alike entitled to maintenance; as are also the step-mothers: the daughter too, but not to a separate subsistence. A step-mother should be supported by her step-sons.[d]

Unmarried and widowed sisters also.

442. Married sisters are considered as provided for. Unmarried ones maintainable out of the family property till marriage are, upon partition, a charge upon it to the extent, as is commonly said, of a quarter of a share; an allotment explained by various authorities, including the *Smṛti Çandrikâ*

a 2 Strange's Hindu Law, 404, Colebrooke.

b If she agree to abandon her course of life. 1 Ibid., 372; 2 Madras Reports, 327.
8 Ibid., 144; 1 Indian Law Reports (Bombay), 559.

c 9 Sutherland's Weekly Reporter, 475.

d 1 Strange's Hindu Law, 172.
1 Madras Reports, 372.
6 Sutherland's Weekly Reporter, 116.
This is Bengal law, but see 5 Madras Reports, 377.

and *Madhaviya*, as meaning a sufficiency only for the expenses of the marriage; and widowed ones, not otherwise provided for, are entitled to be maintained.[a]

443. The allotment of a quarter share to a sister is not a fourth to each sister to be deducted from the share of each brother, but a participation out of the whole equivalent to the fourth of a brother's share without regard to the number of brothers.[b] Sister's allotment.

444. The daughter-in-law (widow) has no right to maintenance from her father-in-law when he has no ancestral property, but she has when he possesses it.[c] Widowed daughter-in-law.

445. In all the classes, it is the duty of the parent to maintain illegitimate issue; an obligation that attaches to the survivors, and is to be provided for upon partition.[d] Maintenance of illegitimate issue.

446. The mothers of such children have the like claim.[e] Mothers of such.

447. All those who, on account of natural defects or disease, are excluded from the inheritance, are likewise a charge upon the estate.[f] Those excluded from inheritance.

a 1 Strange's Hindu Law, 173.
b Ibid.
2 Ibid., 404, Colebrooke.
c 2 Bengal Reports, A. C., 17.
5 Madras Reports, 150.
d 1 Strange's Hindu Law, 174.
Ibid., 187.
e Ibid., 174; 10 Bombay Reports, 381.
12 Ibid., 229. The connection with the mother however must have been permanent; 8 Madras Reports, 144.
f 1 Ibid., 174.

Maintenance and rights of out-castes, &c.

448. Under Act XXI of 1850, out-castes are entitled to maintenance. Under Hindu law they are entitled to food and raiment only.[a]

449. Of persons disqualified to inherit, their childless wives, continuing chaste, are to be provided for; as are also the maintenance and nuptials of their unmarried daughters.[b]

Charges on Zemindaries.

450. A successor to a Raj or Zemindary would be bound by the debts of his predecessor contracted for necessary purposes, *e.g.*, the payment of Government revenue, or for reproductive works upon the estate.

451. The illegitimate son of a Zemindar of the *Çudra* caste is entitled to maintenance, and the maintenance is a charge on the Zemindary.[c]

Maintenance of adoptee.

452. A Hindu, whose adoption is invalid, is entitled to maintenance in his adopter's family.[d]

Arrears of maintenance when recoverable.

453. No rule of Hindu law prohibits the recovery of arrears of maintenance. The Limitation Act specially provides for such a suit. Arrears of maintenance due to a widow at her death do not necessarily revert to the estate from which they were derived, on the ground that they were not separated from the *corpus* during her life.[e]

a 1 Strange's Hindu Law, 174; 3 Madras Reports, 50. *Mitâxarâ*, Chap. II, Sec. x, § 5, and note by *Balambhatta*.

b Ibid., 175.

c 5 Madras Reports, 405. As to claims of illegitimate sons generally, see Chapter on Inheritance, *ante*.

d 1 Ibid., 45.

e 2 Ibid., 36; 1 Bombay Reports, 194; 16 Sutherland's Weekly Reporter, C. R., 76; 3 Indian Law Reports (Bombay), 207.

CHAPTER IX.

PARTITION.

Partition defined.

454. PARTITION, in its most general sense, comprehending as well the division of the paternal property during the life of the father, as that which usually takes place at some period or other among co-heirs, is the adjusting by distribution the possession of different parties to a pre-existing right: as the devesting of exclusive rights in specific portions of property, and revesting a common one over the whole, is implied in re-union.[a]

455. It is an inchoate right, founded on a claim of succession, originating in birth.[b]

Who can claim partition.

456. In the Madras school, sons as well as grandsons, irrespective of all circumstances, may maintain a suit against their father and grandfather respectively for compulsory division of ancestral family property.[c]

Bengal law.

457. This differs from the law in Bengal according to the *Dâya-bhâga*. There, the father's consent is requisite to partition, and, while he lives, the sons have not the power to exact it, excepting under such circumstances as would altogether devest him

a 1 Strange's Hindu Law, 176, 177.

b Ibid.

c 1 Madras Reports, 77, citing *Mitâxarâ, Manu* ix, Sec. 137; 12 Bengal Reports, 373; 10 Bombay Reports, 463; 1 Indian Law Reports (Allahabad), 159. These are all decisions under *Mitâxarâ* law. A partition, however, cannot be demanded by one more than four degrees *from the last owner*, however remote he may be from the original owner.

of his proprietary right, such as his adoption of a religious life. The father of course may divide with his sons when he pleases.[a]

458. In Bengal, sons have not a right of ownership in the wealth of the living parents, but in the estates of both when deceased. They have, however, a proprietary right in their shares, though not in the whole estate. And this title is always considered distinct, though the family is undivided. A son is not a co-sharer with his father.[b]

Bombay.

459. In the Madras school, the father may enforce partition as against his sons, there being no distinction between a father and other co-parceners. In Bombay it has been held that partition cannot be enforced by sons against their father as regards *movable* property.[c]

Partition must be equal, otherwise in Bengal.

460. A father, in making a partition with his sons, may distribute his *self-acquisition* as he pleases but must make an equal distribution of the *ancestral* property. Not so in Bengal. Of ancestral property the father may retain a double share, or divide it as he pleases. According to the *Mitâxarâ*, wives may

a W. H. Macnaghten's Hindu Law, 43, 2nd ed.

b *Dayâ-bhâga*, Chap. I, Secs. 8, 9 & 30. In Madras in co-parcenery a right to a share passes, and not the share itself, as in Bengal. In Bengal where a co-parcener dies without male issue, his share passes to his widow, daughter, and daughter's son, and not to the other co-parceners. 6 Moore's Indian Appeals, 553.

c 2 Madras Reports, 416.
10 Sutherland's Weekly Reporter, 273.
1 Bombay Reports, Appendix, 76. See however, 1 Indian Law Reports (Bombay), 561 where this decision appears overruled.

claim a share equal to a son's, where they have no *Stridhana*, and where they have, half a share. That is, they may claim maintenance.[a]

Partition according to Bengal and Madras law.

461. In Bengal, *partition* is a separation of property into particular shares corresponding to the previously distinct title of each owner. In Madras, where each member has no separate title before division, but the title is joint, partition of title, without partition of estate, is sufficient to constitute a division, regard being had to the intention of the parties.[b]

Share and rights of son subsequently born.

462. Where pregnancy is apparent in the mother, at the time of partition, either the partition should wait, or a share be set apart to abide the event: but if it were then neither manifest nor apprehended, in such case, should a son who was at the time in the womb, be born after, he should obtain his share from his brothers by contribution. He must

a 1 Strange's Hindu Law, 194, 195, 223. Where the father distributes his self-acquisition by way of *gift*, and not according to the rules of partition, the *donees* must be put in actual possession.
3 Madras Reports, 42, 48. These shares of wives, &c., are simply allotments for maintenance. See *post*.
W. H. Macnaghten's Hindu Law, 44, 2nd ed.
As to father's right of partition in Bengal, see further, Ibid., 43.
Mitâxarâ, Chap. I, Sec. ii, § 14; also Sec. vii, § 2.
Dayâ-bhâga, Chap. II, Sec. xx, as to the Bengal law; see, however, 2 Strange, 325, citing Sutherland.
Mitâxarâ, Chap. I, Sec. ii, § 9.

b 3 Bengal Reports, Full Bench Rulings, 39.
6 Sutherland's Weekly Reporter, 139.
7 Ibid., 488.
9 Ibid., 61.
11 Moore's Indian Appeals, 75. In Bengal the co-parceners are *tenants in common* not *joint tenants* as in Madras.

however be conceived before partition. In fact, a re-distribution should take place.[a]

Partition subsequent to father's death.

463. After the death of the father, an equal partition must be made both of self-acquired and ancestral property. The widow and mother also will come in for shares equal to that of a son. The daughter gets a fourth of a share. The shares of the sons will be according to the number of sons, and not according to the number of mothers, *i.e.*, where there has been a plurality of wives.[b]

Heirs of parallel grade and their mode of succession.

464. The heirs of parallel grade who are in natural co-parcenery are a father and his sons, son's sons and son's grandsons: brothers and their sons, son's sons and son's grandsons: male cousins of male descent: widows of the same husband: daughters; daughter's sons; and daughter's daughters inheriting in the female line.[c]

465. Of these the sons, brothers, widows, and daughters, when taking from the father, inherit equally or *per capita;* and the son's sons and son's grandsons, the brother's sons, son's sons and son's grandsons, the cousins, daughters' sons, daughters

a 1 Strange's Hindu Law, 182.
Mitâxarâ, Chap. I, Sec. vi, § 12.
4 Madras Reports, 307; 3 Bengal Reports, Full Bench, 118—121.

b *Dayâ-bhâga*, Chap. III, Sec. ii, § 29; *Mitâxara*, Chap. I, Sec. ii, § 9.
3 Madras Reports, 289.
12 Bengal Reports, A. C., 373, 388. It must be understood that what are called the shares of the widow and the mother and the daughter are simply portions set aside for their maintenance. *Smṛti Çandrikâ*, 4 Suth. 4—17; 2 Strange's Hindu Law, 309. See *post*.

c Strange's Manual, § 234.

taking from the mothers and granddaughters according to the share of the person through whom they derive the inheritance or *per stirpes.*[a]

466. The male issue of a man that is his sons, son's sons, and son's grandsons must have been exhausted before a lapsed share falls to those of parallel grade to himself, that is, to his brothers. In like manner daughters' sons must have been exhausted before the lapsed share of the daughter falls to other daughters.[b] In the remaining classes of co-heirs, the right of one co-heir vests in the survivors of the same grade before passing on to the next in the line of descent.

467. Partition among brothers will alter the line of succession; but not so among daughters. For on failure of male issue of a brother who has divided, the right of the widow, or the daughters accrues. Partition among daughters has no such effect, since upon the death of one if married, her share vests in her own line; if unmarried, in her brothers.[c]

Effects of partition in some cases.

468. A subsequently begotten son shall have recourse only to the remaining property of the

Rights of subsequently begotten sons.

a Strange's Manual, § 235; citing *Mitâxarâ* and *Smṛti Çandrikâ.*

b Ibid., 237. This seems to be contrary to the general opinion. It is however a moot point. For the prevailing notion, see 6 Madras Reports, 310, and 1 Indian Appeals, 124. According to Burnell there is no *survivorship* in Hindu Law. Preface to *Varadaraja's Vyavaharanirnaya.* Representation is said to cease with daughters, and daughters' sons inherit to their grandfathers and not to their mothers.

c *Mitâxarâ,* Chap. II, Sec. xi, §§ 12, 30.

father, succeeding to the whole exclusively, or dividing with it with such of the brothers as may have become re-united to the common parent.[a]

469. Where there is an adopted son and there are other sons by birth after the adoption, the adopted son gets one-fourth of what forms the share of each of the after-born sons.[b]

470. Any acquisition by a re-united father through means of his individual wealth, or personal exertions, belongs exclusively to the son born after partition, *and not to him in common with another re-united.* This latter *dictum* is doubtful and is opposed to *Manu.*[c]

471. Where there is no after-born issue, the sons who had received their shares take by inheritance what their parents leave.[d]

Shares of illegitimate sons.

472. Where illegitimate issue would inherit in case of the death of their putative father, they are also entitled to share on partition in his life; and they are under other circumstances entitled to be provided for to the extent of maintenance. He gets among *Çudras* half the share that falls to a son, daughter, or daughter's son. Failing these he comes

a 1 Strange's Hindu Law, 182.
W. H. Macnaghten's Hindu Law, 47, 2nd ed.
3 Bengal Reports, A. C., 7.

b Elberling, 71.

c 1 Strange's Hindu Law, 182, 183.

d Ibid.

in for a full share, but his obtaining a share in his father's life-time depends upon his pleasure.[a]

473. A minor's share should be secured for him by the sharers. It has been held that a minor cannot enforce partition at his option, unless his interests will be endangered, if his share be left with the co-parceners. His guardian however may consent to partition on his behalf.[b] **Share of minor.**

474. As in inheritance, sons as far as great-grandsons share on partition *jure representationis*, the aggregate grandsons of each deceased grandfather being entitled *per stripem*, not to an equality individually with their uncles and cousins.[c] **Sons and great-grandsons share *per stirpem*.**

475. If one of the sons, absent at the time of partition in a foreign country, die leaving issue, their right survives to them as far as the seventh generation; and on their appearing, the brothers who remained at home and divided, or their representatives, must, to that extent, answer a claim out of their several shares: so also is one who has returned after residing in a foreign country entitled **Share of absent son.**

a 1 Strange's Hindu Law, 187.
Mitâxarâ, Chap. I, Sec. xii, § 2. The authorities of the different schools differ as to the share of an illegitimate son.

b 1 Strange's Hindu Law, 188.
2 Ibid., 362, Colebrooke.
2 Ibid., 182; 3 Madras Reports, 94; 10 Sutherland's Weekly Reporter, 273. A minor can always seek to set aside a division when he attains majority if the division has been unfair. 4 Bombay Reports, O. C., 159; 23 Sutherland's Weekly Reporter, 68.

c 1 Strange's Hindu Law, 187, 188, 207. *Inter se* however they take *per capita*.
Mitâxarâ, Chap. I, Sec. v, § 2.

on his return to receive a share of the property, whether it has been divided or not.[a]

How partition is made.

476. A partition may be made openly in the presence of arbitrators, privately by adjustment, and lastly by casting of lots.[b]

Provision to be made for debts, &c., previous to partition.

477. Previous to partition, debts and other charges such as maintenance and initiation, &c., must be provided for by such means as may be agreed at the time; since taking place in the life of the father, it must be looked upon as an anticipated descent of his property. For a distribution of the debts of any of the co-parceners, the consent of the creditors must be obtained.[c]

478. Where there are outstanding debts both of father and grandfather with assets of each, they may be distributed, analogous to the English practice of marshalling the assets.[d]

479. But for a debt incurred by a disunited father an after born son is exclusively liable, unless it was contracted not on his own account alone, but for the benefit of the family subsequently to re-union; in which case it is eventually a charge, as well upon

a 1 Strange's Hindu Law, 188, 206. The right to a share under these circumstances would be regulated by the Statute of Limitations.

b Strange's Hindu Law, 190, 222.

c Ibid., 191, 223. See further previous Chapter.

d 1 Strange's Hindu Law, 191. The marshalling of assets is such an arrangement of the different funds of the common debtor of two or more creditors as may satisfy every claim, so far as, without injustice, such assets can be applied in satisfaction thereof, notwithstanding the claims of particular individuals

the re-united parceners, as upon sons born after partition.[a]

480. If widows and daughters have before partition received property from the deceased equal to or more than a son's share, they will get nothing more on partition, if less, then they will receive what will equal a son's share.[b]

Impropriety of Court to settle a certain rate of expenditure as being just or otherwise.

481. In a suit for partition by a son, it is improper for the Court, in deciding what debts are just or otherwise, to settle a certain rate of expenditure, as being that which should have been expended by the father, and to debit the estate with all the excess.[c]

482. There is no such legal obligation to frugality, as can be enforced by rendering the father liable for all sums which a Court may think to have been unreasonably expended from the date of his coming into possession, until the date of the suit for partition.[d]

483. If the father could show that the property to be divided is equal in value to that which descended to him, he would be absolutely exempt from any duty to account at all to his son. And if for the purpose of his present acquisitions he has encumbered the ancestral estate, then the plaintiff must take his share of it *cum onere*.[e]

to prior satisfaction out of some one or more of those funds. Story's Equity, §§ 558, 560, 561.

a 1 Strange's Hindu Law, 191.
b 12 Bengal Reports, A. C., 385.
c 3 Madras Reports, 177.
d Ibid.
e 3 Madras Reports, 177.

Waiver of share by son.

484. Where a share is not desired by a son, it may be effectually waived by his acceptance of a trifle in satisfaction, his heirs being bound by his consent. But the son must be himself able to earn wealth. Without renunciation it may still be claimed.[a]

Partition need not be general.

485. Nor is it necessary, where the partition is general, that it should attach upon the whole of the property; a part only may be distributed, keeping what remains for future division, or to descend in a course of inheritance.[b]

Two-fold application of word partition.

486. There is a two-fold application of the word *partition*. There may be a partition of *right*, and there may be a partition of *property*. A partition of the one need not necessarily be followed by a partition of the other. That is, there must be a division of the title and the income, but not necessarily of the estate itself.[c]

487. When the members of an undivided family agree among themselves with regard to particular property that it shall thenceforth be the subject of ownership in certain defined shares, the undivided

a 1 Strange's Hindu Law, 195.
Manu, IX, 207.
Mitâxarâ, Chap. I, Sec. ii, §§ 11, 12.
3 Madras Reports, 33.
5 Ibid., 449.

b 1 Strange's Hindu Law, 195.
2 Madras Reports, 325. When a partition takes place, it is presumed to be complete.

c 11 Moore's Indian Appeals, 75; 4 Ibid., 137, 168.
2 Madras Reports, 325. See also, 3 Madras Reports, 40, 289.

family becomes a divided family with reference to the property that is the subject of that agreement, and that is a separation in interest and in right, although not immediately followed by a *de facto* actual division of the subject-matter. This may at any time be claimed by virtue of the separate right.[a]

488. In Bengal a father is entitled to a share in his son's self-acquisition. If it is acquired with the aid of family funds, the father is entitled to half, the acquirer two shares, and the others to one share each. If not so acquired, the father gets two shares, the son who acquired it two, and the rest none.[b] **Bengal law as to partition of self-acquisition.**

489. Where there has been no fraud or undue advantage taken of a sharer's minority, and in the absence of proof of gross inequality in the distribution of the property, a division will be held valid.[c] **When partition is valid.**

490. A clear intention to hold property separately, and to abandon all claim to the shares of the other partners amounts to a partition.[d] **What amounts to partition.**

491. Under the *Mitâxarâ* a wife cannot claim partition as against her husband, nor her daughter **Widow or daughter cannot call for partition.**

a Above Privy Council and Madras decisions. The intention to divide however must be apparent.

b 2 Bengal Reports, A. C., 287.
Dâya-bhâga, Chap. II, Sec. lxv, *et seq.*
Vyavastha Darpana, 385, 1st. ed.

c 2 Madras Reports, 182.

d 3 Madras Reports, 40.
3 Sutherland's Weekly Reporter, 41.
10 Ibid., 273. This is a still stronger case as one of the partners was a minor.

a share upon its taking place in the life of the father, neither can the one nor the other call for it after his death. This can be done by those alone who are considered as heirs; in contradistinction to those who have a claim only to be maintained—of which latter description are the widow or widows of the deceased, the principle being that the right is co-ordinate with the gift of funeral cakes. In Bengal however, they are entitled to share, when a partition is made and even to sue for a share, under certain circumstances. So are also the mother and grandmother.[a]

492. Where a widow sued to recover from the brothers of her deceased husband a share of her property which remained undivided at his death, it was held that she had no right to recover property which was actually undivided at the death of her husband. It must have been otherwise if the husband's share had been ascertained though he was not yet in possession.[b]

a 1 Strange's Hindu Law, 203, 204.
2 Madras Reports, 325.
12 Bengal Reports, 90, 373, 385; 2 Indian Law Reports (Calcutta), 262. The property must be ancestral.
Mitâxarâ, Chap. I, Sec. ii, § 9. *Smṛti Çandrikâ*, iv, Secs. 4—17.
2 Strange's Hindu Law, 307, 383, 404, Colebrooke. A widow, however, is capable of offering oblations.
W. H. Macnaghten's Hindu Law, 47, 48, 49, 2nd ed., citing Digest. In Bombay the mother seems to get a share on partition; 2 Indian Law Reports (Bombay), 494, 504. In Bengal the stepmother is only entitled to maintenance.

b 1 Strange's Hindu Law, 234. In this case, of course, her husband had no sons.
2 Madras Reports, 325.

493. Disqualified persons cannot call for a partition though their legitimate issue may. But if the disqualification is removed, his right accrues like that of an after born son.[a]

Disqualified persons cannot call for a partition.

494. The mode of division called *Patni-bhâga*, or division by wives, in contradistinction to *Puttra-bhâga*, a division by sons, does not prevail.[b]

Patni-bhâga not recognized

495. Impartible property.[c]

Impartible property.

i. (*a*) Regalities or Ancient Rajs: that is, the *ruling power* is not subject to partition, but descends to the eldest son.

(*b*) Zemindaries, Polliems and estates in the nature of a Raj.

(*c*) Estates that are impartible by agreement.

ii. Lands endowed for religious purposes not being inheritable, are impartible.

iii. Lands allotted by the State for the discharge of particular duties or for the maintenance of a dignity.[d]

a *Mitâcarâ*, ii, 10 Secs. 9—11.
Ibid., Sec. 7. The issue must have been conceived or born at the time of partition. 2 Bengal Reports, Full Bench, 118.

b 2 Strange, 355, Colebrooke. 2 Select Reports (Bengal), 147. Except in some families.

c 1 Strange's Hindu Law, 208—221. Gifts not made in return for something else, and friendly gifts, which, never vesting in the donee, in consequence of his death during the life of the donor, descend to his heir, are held impartible. Ibid., 169, 170. For examples of impartible estates, see Chap. on Inheritance, *ante*.

d 6 Moore's Indian Appeals, 125; 10 Bombay Reports, 228; 6 Moore's Indian Appeals, 426.

iv. Clothes and jewels habitually worn by members of the family, male or female.

v. Separate acquisitions where they have been made without the aid of the family funds.[a]

vi. Nuptial gifts which a man receives with his wife.

vii. Wealth acquired by science, valour, or the like, where the joint property has not been employed in the acquisition.

viii. The gains of prostitution being the profits of a trade recognised and legalised by Hindu law.[b]

ix. Places of religious worship and lands appropriated for that purpose.[c]

Partible property.

Partible property relating to the above:

i. The private property and effects of a Sovereign or Zemindar.

ii. Village and religious dues: and an annuity when made to one of an undivided family and his heirs.

iii. Srotryums and Jaghires.[d]

a As to separate acquisition being impartible, see 6 Bombay Reports, A. C., 54.

b 2 Madras Reports, 56.
6 Bombay Reports, A. C., 1.

c 8 Sutherland's Weekly Reporter, 193.

d 1 Strange's Hindu Law, 208—221.
On the subject of an Inam village being partible or otherwise, see 2 Madras Reports, 470. As to srotryums, see 1 Madras Reports, 465, and note.

iv. An annuity to a member of a joint family and his heirs.

v. The management of lands endowed for religious purposes.

vi. Clothes and jewels belonging to males or females, but not habitually worn.

vii. Self-acquisitions, including those obtained by science and valour, where the family property has been employed.[a]

Augmentation of common stock like accretion under civil law.

496. Where the common stock has been augmented or improved, the benefit on partition, as well as during the period of joint occupancy, accrues to all alike, without regard to the degree in which each may have contributed to its enhancement. It is like accretion under the civil law. If there is a *distinct* acquisition by means of the common stock, the acquirer is entitled to a double share in the acquisition, and this right is kept open for his male issue.[b]

a As to separate acquisition being partible, see 6 Sutherland's Weekly Reporter, 256. There must be a palpable and definite use of the family property by means of which the acquisition was made. It used to be held that the acquisitions of a person educated generally at the family expense were divisible, *e.g.*, a Vakil's gains; but this doctrine is abandoned. Where, however, a son received a *special* education with the aid of the family funds by means of which he acquired wealth, such wealth would be divisible.

b 1 Strange's Hindu Law, 213, 219, 220, 223, 224.
1 Madras Reports, 309.
2 Strange's Hindu Law, 373, Colebrooke.
Mitâxarâ, Chap. I, Sec. iv, § 29.
Dâya-bhâga, Chap. VI, Sec. i, § 128. This is also the case where the help from the family funds is trifling, but the trouble taken

Agreement may be made by one parcener with the others as to re-payment of self-acquired property expended upon the common stock.

497. There is no rule of law, however, which precludes one member of an undivided family, though living together, from entering into an agreement with his co-parceners in respect of the expenditure upon the family property and re-payment of self-acquired funds; and such an agreement is rendered more reasonable and probable, where portions of the family property are occupied and enjoyed by each of the members living separately.[a]

Share of recoverer of family property.

498. When landed property has been recovered, the special claim of the recoverer is to a fourth only, instead of a double share; the merit of recovering what has only been withheld not being considered equal to that of making a new acquisition. The property however must have been taken by others or lost, it must have been recovered from strangers, and not from members of the family, as in the case of disputed inheritance.[b]

Widow of party suing for division.

499. A party suing for division and dying while the suit is pending is still undivided. His widow is not entitled to demand his share.[c]

500. A decree declaring a party entitled to a share in family property not having been carried

in the acquisition is considerable. 6 Sutherland's Weekly Reporter, 219; 9 Ibid., 61.

a 1 Madras Reports, 309.

b 1 Strange's Hindu Law, 220.
9 Sutherland's Weekly Reporter, 70.
8 Ibid., 13.

c Strange's Manual, § 289.

into effect before the death of the party, he is considered as dying undivided.[a]

501. Where the enjoyment of what is in common may have been unequal, that of some having been greater than that of others, the shares upon a division are still to be the same, the law taking no account of greater or less expenditure, unless the difference be such as to exclude ill idea of proportion, the object entirely selfish, or the circumstances of a kind to impute fraud.[b] **How partition is made when the enjoyment of the common stock has been unequal.**

502. If the family of one brother, being more numerous than those of the rest have, in the maintaining of it, incurred a greater expense, so it has been proportionate, and not excessive, the difference is not to be regarded when they come to divide; and the same principle applies as to what may have been laid out on the nuptials of a daughter, or the initiation of a son, occurrences, in Hindu families, which constitute a charge on the joint property where they are undivided.[c]

503. But if one giving a loose to pleasures in which the rest have not participated have thereby broken in upon the common fund to an extent not to be justified, he will, upon partition, receive his portion, diminished by what he has dissipated; though it is said, that if more than the amount of **How partition made when a parcener has used common fund for his own purposes.**

a Strange's Manual, § 290.

b 1 Strange's Hindu Law, 224.
2 Ibid., 394, Colebrooke.

c 1 Ibid., 224.

his share have been so expended, the law does not direct that the excess shall be considered as a debt.[a]

504. It is the same of a loan or gift even for a good (as for a religious) purpose, if made by a parcener on his sole account; or of a sale, a purchase, or an hypothecation; the principle being, that the patrimony or family property is not to be arbitrarily aliened; otherwise, where the purpose and end have been the support, the interest, or the spiritual benefit of the whole.[b]

According to Bengal law, an unproductive parcener may be shared out of acquired property.

505. In the Bengal Provinces, but not in Southern India, an unproductive parcener may be shared out of the property acquired; but must receive his portion of the original stock descended.[c]

Deed of partition not indispensable.

506. In whichever way partition is effected, the law prescribes an instrument in writing, called by Vrihaspati "the written memorial of distribution," but it has not rendered it indispensable.[d]

Requisites of deed where it exists.

507. Where, however, an instrument exists, it should, generally speaking, be attested by kinsmen; the want of whom, and the consequent substitution of more distant relations, or even of neighbours, is always opened to be explained. Such, in fact, is the order in which witnesses for this purpose are classed; *kinsmen* being described as persons allied

a 1 Strange's Hindu Law, 167, 224.
b Ibid., 18, 225.
2 Ibid., 338, 339, Colebrooke.
c 1 Ibid., 197, 224, 225.
d Ibid., 222.

by community of funeral oblations, or as sprung from the same race; *relations*, as maternal uncles and other collateral and distant relations of the family.[a]

Proof of disputed partition.

508. With respect to the proof of a *disputed partition*, though the law favors separation by which religious ceremonies are multiplied, it presumes joint tenancy as the primary state of every Hindu family; and this especially among brothers, it being most natural for such to dwell together in unity.[b]

509. Important as the question may be to strangers, appearances as to the fact are not always to be relied upon. The legal idea of *undivided*, regarding,—as it does *property*, a family may be separated as to residence, meals, and ceremonies, so as to seem, even to their neighbours as well as to others, to be divided, without being so; remaining, in truth, united in interest.[c]

510. On the other hand, having parted property, they may have become legally divided by a severance in their worldly concerns; and yet, continuing to live and eat together, performing also in common their solemn and accustomed rites, they will appear

a 1 Strange's Hindu Law, 223.

b Ibid., 225.
2 Ibid., 347, Ellis.

c 1 Ibid., 225.
2 Ibid., 347, Ellis.
4 Madras Reports, 5.
11 Moore's Indian Appeals, 488.

to be still united, though, in reality, and to legal purposes, they are no longer so.[a]

511. The obscurity in which this matter is sometimes involved, productive as it is not only of eventual litigation, but of occasional fraud and injustice, may be attributed to the law, allowing partition without the presence of witnesses or intervention of any deed; thus leaving a transaction of such important consequence to others as well as to the family to be performed in secret, resting in the breasts and in the consciousness alone of, the parties.[b]

512. This difficulty too, has been enhanced since it has been decided that an actual partition by metes and bounds is not necessary to a division, provided, of course, there has been a partition of title.[c]

How presumption of undivision may be destroyed.

513. The presumption raised by the law from the natural state of families in favor of union may be destroyed by evidence of separate acts inferring a contrary one, and amounting to proof of partition having taken place.[d]

514. Such are for this purpose religious ones, the religious duty of co-parceners being single; dressing food; transactions inconsistent with the

a 1 Strange's Hindu Law, 225, 226.
b Ibid., 226.
c 11 Moore's Indian Appeals, 75.
2 Madras Reports, 325.
3 Ibid., 40.
d 1 Strange's Hindu Law, 226, 227.
2 Ibid., 387, 395.

idea of their continuing united, as making mutual loans, sales, purchases, and other contracts; separate suits by the partners; separate entries in *Revenue Puttahs;* or becoming sureties, or witnesses for one another on subjects of property. To which, as indicating the understanding of neighbours, may be added delivering to them, severally, of provisions and other dues by the village peasants.[a]

515. The religious ceremonies above alluded to are the five great sacraments in favor of "the divine sages, the manes, the gods, the spirits and guests" enumerated, described, and enforced by *Manu*, it being of such of which it is said that of undivided brethren, the religious duty is single, *i.e.*, performed by an act in which all join, severing in them and performing them separately in their respective houses *after* partition.[b]

516. Of the instances specified, the one the most to be relied upon is the taking food separately prepared, since, in general, a distinct preparation of food, after an agreement to separate, proves partition, and the previous agreement may in some cases be inferred from that sole evidence; but more satisfactorily in proportion as a greater number of the indicated circumstances concur.[c]

a 1 Strange's Hindu Law, 277.
2 Ibid., 391, 393, 397, Colebrooke and Ellis.
Mitâxarâ, Chap. II, Sec. 12.
See however, 8 Madras Reports, 25.

b 1 Strange's Hindu Law, 228.

c Ibid., 228, 229.

517. The fact that some of the partners separately possess some of the family lands is not *conclusive* proof of partition.[a]

518. With respect to these circumstances, they are but evidence; though concurrence of all to constitute proof is not requisite. The presumption is that a family separate in residence and food is also separate in estate.[b]

When a re-partition may take place.

519. Generally speaking, a partition once made cannot be opened. Yet, if effects that were not forthcoming at the time be afterwards *recovered* in a way to warrant a claim to participation, and much more if *concealment* had taken place, a discovery leads to a second division.[c]

520. When a co-heir fraudulently appropriates any of the joint property on discovery, distribution will take place, and he will be deprived of his share.[d]

521. Wherever, from any cause not understood at the time, the division proves to have been *unequal* or in any respect *defective*, it may be set to rights notwithstanding the maxim that "once is partition

a 1 Indian Appeals, 21.
b 1 Strange's Hindu Law, 228.
See summary of these circumstances by *Jimuta Vahana*, cited at 230, Ibid.
c 1 Strange's Hindu Law, 230, 231.
d Ibid., 231, 232. This doctrine is not carried out in practice, 3 North-West Provinces Reports, 267.
Mitâxarâ, Chap. I, Sec. ix, §§ 4, 5, 12.
Manu, IX, 213.

of inheritance made;" a position that supposes it to have been fair and made according to law.[a]

522. Not only may an original partition be re-formed by means of a supplemental one, but there may be an entirely new one upon a *re-union* of any of the separated parceners competent to the purpose; and this as well after partition by a father as among co-heirs. According to the *Mitâxarâ* and other authorities the re-union must be between a a father, brother or a paternal uncle. It must be between the separated partners only, for re-union between any one would not be a re-union in the sense of the law. And when this re-union is effected, the descendants of those re-united however remote, will again form an undivided family. There cannot be a re-union of the descendants of those who have separated. Cases of re-union rarely occur.[b]

When a new partition may take place.

523. Other claims being disposed of, if the surviving re-united parceners be partly of the whole and partly of the half-blood, those of the whole take in exclusion of those of the half: while consisting of half-blood only, any *dis*-united co-heirs of the whole divide with them,—union in blood being for this purpose equivalent to re-union in co-parcenery.[c]

Claims of re-united parceners when of the whole and half-blood respectively.

a 1 Strange's Hindu Law, 232.

b Ibid., 233.
Mitâxarâ, Chap. II, Sec. ix, § 3.
2 Madras Reports, 235.
3 Bombay Reports, A. C., 69; 4 Ibid., 166.
5 Sutherland's Weekly Reporter, 249.

c 1 Strange's Hindu Law, 234.
Mitâxarâ, Chap. II, Sec. ix, §§ 6, 9.

Parceners of the half-blood share in the real estate only.

524. The participation of the half-blood at all in this case regards the real estate only; for, as to movable effects they at all events descend exclusively to the whole blood, re-united or not.[a]

Bengal law.

525. In Bengal the whole brothers and whole sisters equally divide their mother's property.[b]

Share of one disqualified on re-partition.

526. The share of one who has entered into the fourth order, or become otherwise disqualified, on re-partition, vests in his representatives; and in general, the rules prescribed for an original partition are applicable to the one in question.[c]

The fact of a father and a minor living together is only evidentiary of re-union.

527. Where a division has taken place amongst the members of a Hindu family, one of whom is a minor, the circumstance that the father and minor continue to live together, and their share become mixed, does not conclusively constitute a state of re-union between the father and the minor, but is evidentiary only to prove the re-union.[d]

Division among widows.

528. Where the widows of a man divide the estate, the title remains joint, and the surviving takes the whole, and neither of the widows has a separate power of alienation. In a case where this was done, the Privy Council said that the partition between the widows did not operate to enlarge either

a 1 Strange's Hindu Law, 234, 235.
b *Dâya-bhâga*, Chap. IV, Sec. ii, § 1.
c 1 Strange's Hindu Law, 235.
Mitâxarâ, Chap. II, Sec. ix, § 13.
d 2 Madras Reports, 235.

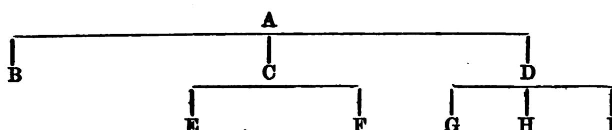
widows estate, so as to give her a greater power of disposition over it, than she would have otherwise had. The estate of two widows who take their husbands' property by inheritance is one estate. The right of survivorship is so strong that, the survivor takes the whole property even to the exclusion of daughters of the deceased widow. They are therefore in the strictest sense co-parceners, and one widow cannot alienate any portion of the estate without the consent of the other.[a]

529. *Stridhana* is divided, after the mother's death, and before the death of the father, among the daughters, the unmarried first, then the married, the unendowed first, or their issue. If there be no daughters, their sons succeed. **Division of *stridhanum* when.**

530. On partition, sons take *per capita:* other than sons take *per stirpes:* **How sons take.**

The subjoined are cases of partition:

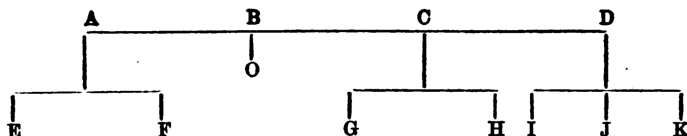
Examples of partition.



A has three sons B, C and D: C dies leaving two sons E and F; and D dies leaving three sons G, H and I. A division takes place. The property is

a 11 Moore's Indian Appeals, 487. No partition can be made by the widows which would convert the joint title into individual ones and abolish the right of survivorship; 3 Madras Reports, 268. See also Privy Council case last cited.

divided into four shares, of which A and B each receive one; one is received by E and F, that is, each gets one-eighth; and E, H and I receive one, that is, each gets one-twelfth.



A, B, C and D are four brothers: A has two sons E and F: B has none: and C and D have each two and three sons respectively, G and H, and I, J and K.

A and B seek a division, and C and D remain united. The property is divided thus: C and D keep half between them, and A and B each gets one-fourth. B dies unmarried, and his share is divided equally between A, C and D, that is, A gets one-twelfth, and C and D one-sixth between them. A's property is now one-third of the whole, and the joint property of C and D equals two-thirds of it. A now divides with his sons, and each gets one-ninth of the whole. C and D next divide, each taking one-third. C and D and their respective sons now divide: C and his sons each gets one-ninth, and D and his sons each gets one-twelfth of the whole property originally possessed by the four brothers. On the deaths of A, C and D respectively, the shares of their sons will each be one-sixth of the whole to each of the sons of A and C respectively, and each of the sons of D, one-ninth of the whole respectively.

CHAPTER X.

WILLS.

531. ACCORDING to Sir Thomas Strange, a will is an instrument unknown to Hindu law; and citing Ellis, he maintains that if a Hindu will is contrary to the *Dharma Çastra*, it is invalid; and if in conformity with it, it is unnecessary.[a]

Sir Thomas Strange's opinion as to Hindu wills.

532. There is some doubt as to the Hindu will being of foreign origin, as pointed out by a writer on the subject. They appear to have been in use before the arrival of the English. Wills at any rate seem to have been adjudicated upon at the very outset of English administration in India, and there seems nothing really antagonistic to them in the *Çastras*. They relate merely to the posthumous devolution of a man's property, and such devolution is treated of in the Hindu system throughout India, before the establishment of English Courts.[b]

Doubtful whether Hindu will of foreign origin.

533. The power of a Hindu to make a will is not of modern introduction, nor is it of local origin. Wills seem to be known to and in use amongst

a 1 Strange's Hindu Law, Chap. XI. This chapter contains *Sir Thomas Strange's* views generally on the subject of Hindu wills. These seem also to have been the views of Mr. *Justice Strange*. According to *Sir Henry Maine* in Hindu law there is no such thing as a true will. The place filled by wills is occupied by adoptions. Ancient Law, 193.

b Montriou's Hindu Will.
2 Strange's Hindu Law, 417, *et seq.*
4 Bengal Reports, O. C., 217, 289.
6 Moore's Indian Appeals, 344, (Madras Case).
12 Ibid., 1.

Hindus, not in the presidency towns only, but from one end of the peninsula to the other. The right to make a will is part of the Hindu law itself. The extent and nature of the disposition which a Hindu testator is capable of making, is not a question of public expediency, or of custom, or usage, but must be regulated by rules to be found in or directly deduced from Hindu law.[a]

Advantage arising from the introduction of wills.

534. Whatever may have been the origin of wills amongst Hindus, either in this Presidency, or elsewhere, they are now recognized by the Courts of Justice, and not without advantage, inasmuch as they stimulate the circulation of property, and quicken the stagnation of Hindu society.[b]

a 4 Bengal Reports, O. C., 103, Per *Norman, J. Sir Henry Maine* remarks that there are in the local customs of Bengal some faint traces of the testamentary power. To the Romans however belongs pre-eminently the credit of inventing the will, the institution which, next to the contract, has exercised the greatest influence in transforming human society. Ancient Law, 194.

b 1 Madras Reports, 326, the Leading Case.

Regulation 5 of 1829 shows their statutory effect. Under this Regulation the Courts at one time seemed to think that wills were inoperative under Hindu law. So far back as 1823 the Madras Sudr Reports, established the validity of wills, and in 1838 the Privy Council confirmed a decision of the Madras Sudr establishing the will of a Hindu. 2 Madras Sudr Decisions 12, affirmed 2 Moore's Indian Appeals, 54. This was more an alienation than a will. See however Madras Sudr Decision, 1851, 226, affirmed by the Privy Council, 6 Moore's Indian Appeals, 309. The Madras Sudr, nevertheless, so long as it lasted seemed to lean against the validity of Hindu wills. It was not till the establishment of the High Court in 1862, that wills were formally recognised. See the Leading Case above cited. See also 6 Indian Appeals, 182. In 1866 the Bombay High Court also appeared formally to have recognised the validity of Hindu wills; 3 Bombay Reports, A. C. 8.

535. It does not follow (assuming that wills have been introduced into Hindu law from the law of a foreign country,) that as a necessary consequence, the whole of the foreign law relating to the subject-matter must be imported with it. Where such introductions take place, so far as it can be done, the foreign matter must be moulded according to analogies derivable from the indigenous law. The rules of Hindu law must also be kept in view.[a]

The whole of the English law of wills does not apply to Hindu wills.

536. It was accordingly held that as there is no transaction of Hindu law which absolutely requires a writing, a Hindu might make a nuncupative will of property, whether immovable or movable. The Court saying that contracts of every description involving both temporal and spiritual consequences may be made orally; and it would be singular if it were to attempt to rule that, all other expressions of a will are valid when delivered by word of mouth, but that the expression by a man of his will, as to the disposition of his property after his decease, shall be wholly invalid, unless reduced to writing.[b]

537. So also a Hindu's will (not executed under the Hindu Wills Act) need not be attested: it need

A Hindu will need not be attested nor signed.

a 2 Madras Reports, 37.
3 Ibid., 50.
3 Bombay Reports, A. C., 6.
4 Bengal Reports, O. C., 169.
7 Knapp's Privy Council Cases, 247.
8 Moore's Indian Appeals, 66.

b 2 Madras Reports, 37.
Under English law, soldiers and sailors may make nuncupative wills. 1 Vic. c., 26, Sec. xi.

not even be signed. No formalities are necessary. The will, however, must be complete and express the unbiassed intentions of the testator.[a]

Construction of Hindu wills.

538. The rule as to construction, too, of Hindu wills, is not the same as that of English wills. The construction of an English will depends upon the peculiarities of the English law of property, and upon distinctions between real and personal property, which are altogether unknown to Hindu law.[b]

539. Accordingly, under a bequest by a Hindu followed by a direction to the following effect—"In this manner continue to pay in the legatee's name, so long as he shall be alive: after his death, continue to pay the same to his descendants from generation to generation," it was held, *first*, that the legatee took only a life-interest, and not absolutely under the bequest: *secondly*, that the words "from generation to generation" were not technical words, and did not impart more than the words "absolutely" and "for ever:" *thirdly*, that the testator's intention was that the "descendants" at the time of the death of the tenant-for-life should take absolutely as a class: *fourthly*, that such descendants were entitled

a 1 Madras Reports, 328, Reporter's Note and Addenda, xi.

1 Bombay Reports, O. C., 77; 3 Indian Law Reports (Bombay), 7; 6 Bombay Reports, A. C., 224. Even petitions, &c., to officials have been considered as wills. 2 Indian Appeals, 7; 3 Ibid., 259.

b 1 Madras Reports, 400.

2 Ibid., 37.

in equal shares to an amount sufficient to produce the sum bequeathed.[a]

540. Again, the "descendants" of A in a Hindu will would include children and grandchildren living at his decease, but does not include A's brother or widow. The term "male issue" also is not confined to sons alone.[b]

541. The principal rule of construction is that the Court ought to gather the intention of the testator from that which the will expressly, or by implication declares. This rule is just as applicable to the wills of Hindus as to those of persons of other religions.[c] Principal rule of construction.

a 1 Madras Reports, 400; 8 Moore's Indian Appeals, 66. It might be here observed that one English rule of construction, it is conceived, would also apply to Hindu wills. According to English law where a testator leaves a legacy absolutely as regards his estate but restricts the mode of the legatee's enjoyment to secure certain objects for the benefit of the legatee, and where such objects fail, the absolute gift prevails, and will not fall into the residue of the testator's estate. The legacy itself, of course, must be one that is otherwise valid according to Hindu law, and it must also be clear that the intentions of the testator was that the legacy should be absolute. The English cases are *Lassence* v. *Tierney*, 1 M. and G., 551 and *Kellett* v. *Kellett*, L. R., 3 H. L., 160.

b 1 Madras Reports, 400; 8 Bengal Reports, 400.

c 4 Ibid., O. C., 176.

The Privy Council say :—"The Hindu law, no less than the English law, points to the intention, as the element by which we are to be guided in determining the effect of a testamentary disposition; nor is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes, but the meaning to be attached to them may be affected by surrounding circumstances, and when this is the case, these circumstances must no doubt be regarded. Amongst the circumstances thus to

Power of bequest by will.

542. A Hindu may by will create particular estates to enure to the benefit of particular individuals. He is not bound to dispose of the *whole* of his estate.[a]

Perpetuities.

543. There is no rule of Hindu law, however, imposing any restriction in point of time on the operation of a bequest, creating a series of successive life-interests in each generation of a legatee's descendants. But the grounds of the rule against perpetuities are applicable to the property of Hindus, and the Court will be very reluctant to construe a Hindu will, so as to tie up property for an indefinite period.[b]

544. Trusts created under a will may and have been frequently enforced against Hindus, and will always be enforced when they are valid.[c]

be regarded is, the law of the country under which the will is made, and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator in the dispositions which he has made, had regard to that meaning, or that effect, unless the language of the will, or surrounding circumstances displaces that assumption, 9 Moore's Indian Appeals, 123. See also as to construction 1 Madras Reports, 400; 2 Indian Law Reports (Calcutta), 262.

a 4 Moore's Indian Appeals, 137.

b 1 Madras Reports, 400. The English rule against perpetuities, as applicable to Hindus, has been controverted and commented on in 4 Bengal Reports, O. C., 107, the Tagore Will Case.
2 Bengal Reports, O. C., 11, 103.

c Ibid., 103; 4 Ibid., 107; 4 Moore's Indian Appeals, 452.
6 Moore's Indian Appeals, 53, 531.
8 Ibid., 66.
9 Ibid., 55. Assent is not necessary to give validity to a bequest under a will, therefore a bequest to an infant or an idiot is valid, as also in other cases. Marshall's Reports, 357.

545. With reference to the rule against perpetuities, it has been held by the Privy Council that, it would be to apply a very false and mischievous principle if it were held that the nature and extent of testamentary disposition by Hindus could be governed by any analogy to the law of England. The law of England is concerned with a system of the most artificial character, founded in a great degree on feudal rules, regulated by Acts of Parliament and adjusted by a early course of judicial determination to the wants of a state of society, differing as far as possible from that which prevails among Hindus. Perpetuities however, are not permitted under Hindu law.[a]

Cypres.

546. The English doctrine of *cypres* is not applicable to Hindu wills.[b]

Where a will indicated the person who is to be the object of the testator's bounty, he is entitled to take although testator conceived him to possess a character which in point of law cannot be sustained.

547. Where plaintiff sued as the widow of an adopted son (a daughter's son, and, therefore, ineligible for adoption) for the property of the adoptive father, and also on the ground that the adopted son was the devisee of the adoptive father, it was held that as the language of the testator sufficiently indicated the person who was to be the object of his bounty, the person so indicated was entitled to take, although the testator conceived him to possess a

a 10 Moore's Indian Appeals, 308.
8 Ibid., 66.

b 4 Bengal Reports, O. C., 169. When a literal compliance with a testator's directions becomes inexpedient or impracticable, the Court will carry out the will as near as it can according to the original purpose or as it is technically said *cypres*. Story's Equity Secs. 291, 1169.

character which, in point of law, cannot be sustained. The Court remarking that the authorities for persons taking as "*personæ designatæ*," even in opposition to an established rule of construction of the words used are very numerous. It is unnecessary, it said, to enlarge upon this subordinate rule, which is only a particular example of the more general rule that the construction of all written instruments is to be such, as will effectuate the expressed intent of the author of the instrument.[a]

Law of wills in Madras.

548. The Hindu law in Madras admits of the testamentary disposition of property, both ancestral and self-acquired.[b]

Bengal law.

549. In Bengal, the power to devise property is under fewer restrictions than in Madras. There, too, the principle prevails that how objectionable soever an act may be in a moral point of view, in point of law it will be valid and irreversible.[c]

Extent of the power of devise generally among Hindus.

550. The legal right to make a will being settled, there seems nothing in principle or reason opposed *to the exercise of this power being allowed co-extensively with the independent right of gift, or other disposal by act inter vivos,* which by law, or established usage, or custom having the force of law, a Hindu now possesses in Madras. To this extent, the power of disposition can reasonably be considered to be in conformity with the respective proprie-

a 2 Madras Reports, 462.
b 1 Ibid., 326.
c 1 Strange's Hindu Law, 260.
1 Madras Reports, 326.

tary rights of the possessor of property, and of heirs and co-parceners as provided and secured by the provisions of the Hindu law.[a]

551. The right of devise is co-extensive with that of alienation, except where, in an undivided family, the right of devise conflicts with the law of survivorship in which case the former gives way.[b]

A man having male issue cannot disinherit them.

552. Though large innovations have been made upon Hindu law in the matter of wills, yet it has never been contended that a man having male issue can by will disinherit. Nor can he deprive the rest of a sufficiency for their maintenance. And where there is no land, they must all be provided for to that extent out of his personalty.[c]

553. It is by no means clear upon the authorities that he can even by gift *inter vivos* deprive them of

a 1 Strange's Hindu Law, 258, 259.
1 Madras Reports, 326, citing *Mubana Luchmia* v. *C. Venkata Rama Jagganadha Row*, 2 Moore's Indian Appeal Cases, 54; *Nagalutchmee Ummal* v. *Goopoo Nadaraja Chetty* and others, 6 Moore's Indian Appeal Cases, 309 and *Sonatun Bysack* v. *Sreemutty Juggutsoondree Dossee*, 8 Moore's Indian Appeal Cases, 66.
2 Madras Reports, 37, following above decision.
Ibid., 369.
See, however, 3 Madras Reports 50, questioning the power of a Hindu to devise whatever he may give. And it has been since held that it is not law that all that a Hindu may dispose of *inter vivos* can be disposed of by a mortuary instrument. 8 Madras Reports, 13; Ibid., 6. See also 4 Bombay Reports, O. C., 158; 3 Bombay, A. C., 6.

b Mayne's Hindu Law, Sec. 349, 2nd ed., citing 12 Moore's Indian Appeals, 1, 38.

c 1 Strange's Hindu Law, 261.
3 Madras Reports, 50.
1 Strange's Hindu Law, 18—21, 261.

their right to share even in his *self-acquired real* property, and it is perfectly clear that such male issue would be absolutely entitled to it at his death.[a]

A will not invalid though omitting to provide for widow.

554. A Hindu's will, however, would not be invalidated merely by its omitting to provide for his widow.[b]

Extent of power of bequest over ancestral and self-acquired property.

555. The Privy Council in the case above cited lay down that ancestral property may be disposed of by will, unless by reason of some inherent peculiarity, it be withdrawn from the testamentary power: that he cannot do so when he has a son, because the son immediately on his birth becomes co-parcener with his father: that the objection to bequeathing ancestral property is founded on the Hindu notion of an undivided family, and that when there are no males in the family, the liberty of bequeathing is unlimited. And with regard to self-acquired property, they said that, though the law of Madras differed from that of Bengal with regard to wills, yet even in Madras it is settled that a will of property, *not ancestral*, may be good: a decision to this effect has been recognised and acted upon by the Council, and indeed the rule of law as to that is not disputed.

556. A co-parcener cannot alienate by will his undivided interest in joint property; and, generally,

a 3 Madras Reports, 50. See also 2 Strange's Hindu Law, 2 Sutherland; and W. H. Macnaghten's Hindu Law, 44, Note, 2nd ed.

b 1 Madras Reports, 326.
2 Ibid., 462, citing *Nagalutchmee Ummal* v. *Goopoo Nadaraja Chetty*, 6 Moore's Indian Appeal Cases, 109.

a will opposed to the principles of Hindu law is invalid. And where a will is invalid, the property passes to the heir at law.[a]

557. A gift to a man and his sons and grandsons, or to a man and his sons and son's sons, would, in the absence of anything showing a contrary intention, pass a general estate of inheritance according to Hindu law.[b] **Effect of certain words of limitation in will.**

558. A gift by will of an estate to a man under the Hindu law, even *without any words of limitation*, would convey a *general* estate of inheritance in the absence of words showing a contrary intention. But if a will should be made by gift, or conveyance to a man, or to a man and his sons and son's sons, and words should be added that the elder heir should always be preferred to the younger, and that every elder son of each heir in succession by descent, and his issue, as heirs male by descent, should be preferred to every younger son, or his issue, as heirs male by descent, to the exclusion of females and their descendants, and that in default of sons or son's sons, the estate should go over to a third person and his heirs, such a gift could not, without doing violence to language, be construed as expressing an intention to vest in the donee a general and

a 8 Madras Reports, 6.
9 Bengal Reports, 402. A will which restrained legal alienations or forbade partition, &c., would be invalid. 14 Bengal Reports, 175; 6 Indian Appeals, 182; 1 Indian Law Reports (Calcutta), 104.
8 Moore's Indian Appeals, 18.

b 4 Bengal Reports, O. C., 182.

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absolute estate of inheritance, alienable at pleasure and descendible to all heirs according to Hindu law, lineal or collateral, male or female, as the case might be.[a]

559. A gift over, upon an event which might be indefinitely postponed, is void. Or, as was ruled in the Tagore Will case, a gift by a Hindu to a person not ascertained, or capable of being ascertained at the time of the death of the testator, cannot take effect: therefore a gift to the unborn male issue of the sons and grandsons of the testator must fail. Where there is a gift to a class, and some persons constituting such class cannot take in consequence of the remoteness of the gift, or otherwise, the whole bequest must fail: A will, will also be void for uncertainty.[b]

560. A Hindu cannot make a gift by will, under any circumstances to an unborn person or persons.[c]

a 4 Bengal Reports, O. C., 183. Where a devise is made to a woman, strong words are necessary to pass an absolute estate. 13 Moore's Indian Appeals, 209; 2 Indian Appeals, 7, 14, 256.

b Ibid., 103. But when the legatees took vested interests, subject to be devested on death, before any contingencies mentioned in the will happened, the mere postponement of the period of distribution of the legacies will not make the bequests invalid. 4 Indian Law Reports (Calcutta), 304.

8 Ibid., 400; 4 Indian Law Reports, 508. A gift, is valid, whether by way of remainder, or by way of executory bequest upon an event which is to happen, if at all, immediately on the close of a life in being. 9 Moore's Indian Appeals, 135; 10 Moore's Indian Appeals, 279, 308, 311; 5 Indian Appeals, 138. The general rule is that a Hindu may bequeath and devise in any manner which does not conflict with the principles of Hindu law.

c Ibid.

561. Entails cannot be created under a Hindu will, as estates-tail are wholly opposed to the general principles of Hindu law. In the Tagore Will case, devises of estates-tail were rejected as void, and the Court refused to convert them into larger estates than the testator intended. The words of the devise, the Court said, cannot be construed to pass a general and absolute estate. As the devisee had no sons born in the life-time of the testator, the devise to the use of the first and other sons successively of the eldest son of the devisee lapsed. By Hindu law, a gift cannot operate upon property, unless the donee is in existence, so that as soon as the property is relinquished and passes out of the donor, it vests in the donee. That, in the case of a will, would be at the time of the death of the testator, from which moment the will operates as a relinquishment, except in the case of a posthumous child of the testator, or a son adopted by the widow of a testator. Therefore the devises to the sons of the devisee, to be born, or adopted after the death of the testator, are not valid, according to Hindu law. The gift to trustees does not cause the invalidity, for the law will not permit that to the donee indirectly, which cannot lawfully be done directly.[a]

Entails not recognised in Hindu law.

a 4 Bengal Reports, O. C., 103.
8 Moore's Indian Appeals, 85. A man cannot create a new form of estate, or alter the line of succession allowed by law for the purpose of carrying out his own wishes or policy. 6 Moore's Indian Appeals, 555. The Tagore Will was an attempt to strain the English law as to *executory devises* and to introduce a novel feature in the law of inheritance. An *executory devise* under English law is such a limitation of a future estate or interest in property as the law admits in the case of a will, though con-

Trusts for accumulation.

562. Wills containing trusts for the accumulation of proceeds of property are invalid as being against the provisions of Hindu law.[a]

When remote kinsman postponed to devisee.

563. The title of a remote kinsman, though heir of a Hindu testator, who died without leaving issue, or any near relative surviving him, and with whom that remote kinsman had not been united in food, worship, or estate, cannot prevail against the title of a devisee of that testator, whether such property was by the testator self-acquired, or held in severalty, either by virtue of a partition, or of the non-existence, or if any did ever exist, the extinction of co-parceners.[b]

Woman may make will.

564. A woman may make a will alienating her *Stridhana*, unless it is immovable property given her by her husband: the daughters must then consent.[c]

trary to the rules of limitation in conveyances at common law. As if lands be devised to A, an infant, and his heirs, but in case A should die under the age of twenty-one years, then to B and his heirs. The time within which the contingencies of an executory devise must happen is that within the period of any fixed number of existing lives and an additional term of twenty-one years; allowing further for the period of gestation should gestation actually exist. Williams' Real Property, 301, 304, 9th ed. So also it was held that a bequest by a Hindu to a class of persons, some of whom are not in existence at the date of the testator's death is wholly void, and the fact that some of the class are then living and capable of taking, will not enable the class to open out and let in any after-born members of the class. 4 Indian Law Reports (Calcutta), 455.

2 Indian Law Reports (Calcutta), 262.

a 2 Bengal Reports, O. C., 11.

4 Ibid., O. C., 231.

b 3 Bombay Reports, A. C., 6.

c 5 Madras Reports, 111; 3 Sutherland's Weekly Reporter, 49. She could dispose by will of *Soudayika* though it be *immovable*.

565. Wills made on or after the first day of September 1870, within the local limits of the ordinary Original Civil Jurisdiction of the High Court, or which relate to immovable property, situate within the said limits, so far as relates to such property, are subject to the provisions of the Hindu Wills Act of 1870. Under this Act wills must be *in writing*.

Wills under Presidency Towns' Wills Act.

566. The Hindu Wills Act (1870) lays down rules for the construction of Hindu wills. It makes a considerable part of the Indian Succession Act relating to wills and codicils, their proper execution and construction, their probate, &c., applicable to the wills of Hindus under the Act. Of course this enactment refers only to wills made within the Presidency towns, or relating to property situate therein, but the rules of construction are such as will be of use for all wills of Hindus.

Rules under above Act.

567. The following provisos, too, are embodied in it:

i. Marriage shall not revoke any will or codicil.

ii. A testator shall not acquire authority by the Act to bequeath property which he could not have alienated *inter vivos*, nor deprive any person of any right to maintenance which he could not but for the Act have deprived them of.

iii. No property shall vest in an executor or administrator with will annexed, which the testator could not have alienated *inter vivos*.

iv. The law of adoption and of intestate succession shall remain unaffected by the Act.

v. No Hindu shall acquire authority to create in property any interest which he could not have created before 1st September 1870.

Changes effected by the Act.

568. Great changes have been effected by the Hindu Wills Act in the matter of Hindu wills executed in the Presidency Towns: nuncupative wills are abolished: and particulars are given as to the due *execution*, attestation, so that the law on these matters is, to some extent, assimilated to that of the English Wills Act (1 Vic. c. 26).

Position of Hindu executors and administrators.

569. With regard to probate and administration, before the Hindu Wills Act, it had been decided that, though the Court had power to grant probate of a Hindu will if applied for, it had always been held that, a Hindu executor could not be compelled to bring in a will, and prove it in solemn form. It was not incumbent upon the representative of a Hindu to take out administration, or probate, except in the case provided for in Act 27 of 1860, Section 2; and even then, he need not procure the certificate, probate, or letters of administration, when the Court was of opinion that, payment of a debt due to the estate was withheld from fraudulent or vexatious motives, and not from a reasonable doubt, as to the party entitled. It was optional with the Hindu executor, whether he would prove the will or not. The Court had no jurisdiction to compel him to do so. If he set up the will in a suit,

its validity would be tried, just as is the case in England, when a will relating only to realty, and therefore not requiring probate, is set up, by some one claiming under it. It is a totally different matter, when the executor had actually applied for probate, and thus submitted himself to the ecclesiastical jurisdiction. The next of kin had a right then to compel him to proceed and prove the will.[a]

570. A Hindu executor, not under the Wills Act, derives his title entirely from the will of the deceased, and not, as an executor under an English will, from the grant of probate by the Court.[b]

571. An executor to a Hindu will, not under the Wills Act, simply occupies the place of a manager of property. He takes no estate as executor. He is only a trustee for those who take under the will. He has not the same power over the movable and immovable property of the testator, as an executor under an English will would have over personalty. A Hindu executor must only exercise his powers for the benefit of the estate. A Hindu administrator stands in the same position.[c]

Duty of alienee of executor.

572. An alienee of an executor must, like a purchaser of ancestral property, satisfy himself that the

a 1 Madras Reports, 59. These observations will still apply in the Mofussil.

b 1 Bengal Reports, O. C., 24.

c Bourke's Reports, O. C., 48; 2 Bengal Reports, O. C., 1; 6 Moore's Indian Appeals, 393. The English common law rule that the undisposed of residue vests in the executor does not apply to Hindus; 2 Indian Law Reports (Bombay), 388.

executor is acting within his powers, otherwise he will be liable to refund what he may have obtained.[a]

Position of executor, &c.

573. The position of an executor, or administrator, is considerably altered by the Wills Act. His rights, duties and powers are specifically defined therein; but it is conceived that the general principles of Hindu law will still apply to him, as also to the testator, with regard to dealings with property under the Act.[b]

574. Under the Hindu Wills Act, though probate is, letters of administration to the property of an intestate are not compulsory. An executor or administrator under the Act is the representative of the testator: all his property vests in him under the Act, and not under the will.

Certificates of succession.

575. Certificates of succession under Act XXVII of 1860 can only be granted to persons claiming to be representatives of deceased persons to enable them to recover debts and receive interest or dividends; but such certificate concludes only the debtors of the estate, and the procedure given by the Act was not intended to apply to the decision of any right to succeed to the estate of a deceased person.[c]

Parol revocation of a will valid.

576. There may be a parol revocation of a will by a Hindu, but not under the Hindu Wills Act.[d]

a Bourke's Reports, O. C., 48.
b See Section 3, Hindu Wills Act.
c 2 Madras Reports, 164.
d 4 Indian Appeals, 228.
As to rules for the execution, construction, &c., of Wills, see Appendix B.

577. Wills may be registered under the Indian Registration Act (Act III of 1877.) **Registration of Will.**

CHAPTER XI.

TRUSTS.—PRIVATE, PUBLIC AND RELIGIOUS.

578. As to Private Trusts, see also Chapter on Wills. **Private Trusts.**

579. There is a class of trusts which frequently arise in India in connection with *Benami*. They may be considered as implied resulting trusts. In India it is common for purchases to be made by one in the name of another, sometimes for the purposes of fraud—the most common object being to defraud creditors. This, however, is not always the case, and frequently the transaction is entered into because it is customary. So customary indeed have these transactions become that they are recognised all over the country. And the great difficulty the Courts have to contend with is to see that no fraud has been practiced by the parties.[a] ***Benami.***

a In the case of *Gopeekristo Gosain* v. *Gungapersaud Gosain*, 6 Moore's Indian Appeals, 53, *Lord Justice Knight Bruce* remarks: "It is very much the habit in India to make purchases in the names of others and from whatever cause or causes the practice may have arisen, it has existed for a series of years, and these transactions are known as '*Benami* transactions'; they are noticed, at least, as early as the year 1778 in Mr. Justice Hyde's notes, where in a case that came before in him that year, *Doe dem Tilluck Seit* v. *Gour Hurry Day* (Morton's Dec. 249), the practice is mentioned. And again there was a case in *Sir Edward Ryan's* time, *Maha Ranee Busnutt Coomaree* v. *Bulladeb* and others reported in Fulton, 303. The law and practice on the subject was recognised by the Privy Council in 1843 in the case of *Dharm Das Pandey* v. *Mussumat Shama Soondri Dibiah*, 3 Moore's Indian Appeals, 229.

580. Where a purchase is made by one in the name of another there arises, according to a well known principle of equity, a resulting trust in favor of the person who advanced the money, if it cannot be shown that the person, in whose name it is made, is really the beneficial owner. In all cases, therefore, of *benami*, the question to be decided is, who paid the purchase money, and evidence will be admitted to prove the real state of the case.[a]

581. The practice is very common in India to make purchases in the name of the eldest son for the benefit of the whole family.[b]

582. Where a father makes a purchase in the name of a child, the presumption does not arise in this country as it does in England that it was intended by way of *advancement*. The criterion, in every case in the words of *Lord Campbell*, is the quarter from which the money comes with which the purchase money is paid.[c]

a A resulting trust is one returning by implication for the benefit of the settlor or his representatives, either from the want of consideration or failure of the objects of the trusts, or the indefinite nature of, or want of trusts. As where A conveys land to B without consideration and without any uses or trusts being declared. Story's Equity, Secs. 1196, *et seq*. The leading case on resulting trusts is *Dyer* v. *Dyer*, 1 Leading Cases Equity, 184, 3rd ed.

b 3 Bengal Sudr Dewany Reports, 366.

c 3 Moore's Indian Appeals, 240. The leading case on *Benami* in the name of a child is that of *Gopeekristo Gosain* v. *Gungapersaud Gosain*, 6 Moore's Indian Appeals, 53. This case further illustrates the point that the presumption does not arise, as in English law, that a purchase in the name of a child is intended as an advancement to that child. This was a case from Bengal

583. The greater number of instances of *benami* purchases are made in the names of persons ignorant at the time of their being so made.[a]

584. The Courts will not permit a real owner of property to practise fraud upon third parties, whether *bonâ fide* purchasers for valuable consideration, or creditors, by the process of *benami*.[b]

and here the purchase was made by the father in an undivided family in the name of one of his sons, and it was held that the purchase did not enure to his benefit alone, but for the benefit of the whole family. In the course of his observations in this case, *Lord Justice Knight Bruce* observed that, notwithstanding the respondent was the *only* son when the purchase was made (in his name), the objection in point of morality and of religion was a circumstance of conduct so strong according to Hindu principles, that it is not lightly to be assumed: it forms an objection against importing into the Hindu law that rule of positive law which exists in England. Purchases in the names of children, without any intention of advancement, are frequent in India; that is recognised in many cases and among others in that of *Ameree Tewaree* v. *Rai Raghoo Bun Suhai* (3 Bengal Sudr Dewany Reports, 366.)

a Per Lord Justice Knight Bruce in *Gopeekristo Gosain* v. *Gungapersaud Gosain*, 6 Moore's Indian Appeals, 53.

b 10 Sutherland's Weekly Reporter, 185.

24 Ibid., 79. A purchaser, however, should satisfy himself that the person with whom he deals is the real owner by demanding the production of the muniments of title, &c., otherwise he will be held to have had notice of the trust. 6 Bombay Reports, O. C., 59. *A fortiori* will a person not be allowed to defraud creditors. It seems, however, that the Courts have held that, even in such a case, it would be open to the real owner to establish his rights against the *benamidar* where there is an attempt by the latter to defraud the former of his property. 21 Sutherland's Weekly Reporter, 422; 1 Indian Law Reports (Allahabad), 403. The true rule, however, seems to be that where the owner has not *actually* defrauded any one, the Court may relieve him; otherwise, if he has done so. Mayne's Hindu Law, Sec. 371, 2nd ed., citing the English decisions.

Public Trusts.

585. As to Public Trusts, see Regulation VII of 1817. This Regulation relates to the due appropriation of the rents and produce of lands granted for the support of Hindu Temples and Colleges, or other public purposes : for the maintenance of Chuttrums, &c., and for the custody and disposal of Escheats.

586. The Regulation is intended to be supplementary of existing remedies, and the Court had unquestionable jurisdiction in such cases prior to its enactment. The expression in Section 14 is not intended to limit the jurisdiction of the Courts to the cases contemplated in it, but rather to provide against the finality of erroneous orders that may be passed by the Board of Revenue under the Regulation.

587. The Revenue Board has the superintendence of all escheats under Regulation VII of 1817. Where an endowment has been abandoned it becomes an escheat.

Religious Trusts and the provisions of the *Devastanum* Act.

588. As to Religious Trusts—Act XX of 1863, commonly called the *Devastanum* Act, regulates the administration of trusts in connection with Temples, repealing that portion of Regulation VII of 1817, on that subject. The remainder of the Regulation refers to Public Trusts.

589. With regard to the maintenance of national idol-worship, endowments have been made at different times to the various Temples in the country by

the Princes of India, and by the wealthy members of communities. The management of the funds belonging to these Temples was at one time vested by Regulation VII of 1817, in the Revenue Board, but under Act XX of 1863, this has been removed, and the management is now vested in Committees appointed under the Act, who are under the supervision of the District Courts of the several Districts in which the Temples are situated, and who are liable, civilly and criminally, for mismanagement of Temple funds and property.[a]

590. The management of a Temple may be hereditary and at the time of its endowment this stipulation may be made by the grantor. The management may vest in the family of the grantor, as it most frequently does, or it may be vested in the line of some other person and it may vest in a whole family jointly, or in a single individual.[b]

591. Under sections *three* and *four* of the Devastanum Act, two kinds of Managers of Temples are referred to. The former refers to the Manager, who under Regulation VII of 1817, was appointed by Government, or whose appointment was sanctioned or confirmed by Government, or their agent, acting on their behalf. The latter refers to the Manager who was never so appointed, but whose succession was probably hereditary. Over the former only, the Committee under the Act have control, but not

a Under the Act no Member of a Committee can act as Trustee, Manager or Superintendent of a Temple, &c.

b 4 Sutherland's Weekly Reporter, 79.

over the latter; but of course both kinds are amenable to the jurisdiction of the District Court.[a]

592. Under the *Devastanum* Act, the Committee have power to dismiss the Trustees or Superintendents of Temples described in section *three* of the Act, without recourse to a civil suit, but such power can only be exercised on good and sufficient grounds.[b]

a 7 Madras Reports, 77.
5 Ibid., 4, 8, 53.
Section 3 says :—In the case of every Mosque, Temple or other religious establishment to which the provisions of either of the Regulations specified in Section 1 are applicable and the nomination of the Trustee, Manager, or Superintendent thereof at the time of the passing of this Act is vested in, or may be exercised by, the Government, or any public officer; or in which the nomination of such Trustee, Manager, or Superintendent shall be subject to the confirmation of the Government, or any public officer, the Local Government shall, as soon as possible after the passing of this Act, make special provision as hereinafter provided.
Section 4, in the case of every such Mosque, Temple or other religious establishment which at the time of the passing of this Act shall be under the management of any Trustee, Manager, or Superintendent, whose nomination shall not vest in, nor be exercised by, nor be subject to the confirmation of the Government or any public officer, the Local Government shall, as soon as possible after the passing of this Act, transfer to such Trustee, Manager or Superintendent all the landed or other property which at the time of the passing of this Act shall be under the superintendence or in the possession of the Board of Revenue, or any local agent, and belonging to such Mosque, Temple or other religious establishment, except such property as is hereinafter provided, and the powers and responsibilities of the Board of Revenue and the local agents in respect to such Mosque, Temple, or other religious establishment, and to all land, and other property so transferred, except as regards acts done and liabilities incurred by the said Board of Revenue or any local agent previous to such transfer shall cease and determine.

b 3 Madras Reports, 334.

593. Nor do they require the sanction of the Court to institute a suit, in order to establish their authority under section *three* of the Act, or to establish it as against the Temple officials. The suits which require the sanction of the Court are only suits which refer to the malversation of Temple property by the Temple officials, and not suits with reference to other matters in connection with these Institutions, as for instance, a suit to establish a right to share in the management. Nor is leave required to file a suit against the heir of a deceased Manager for recovering the property misappropriated by the deceased. The right to bring such suits is a pre-existing right, and is not accorded by the Act.[a]

a 3 Madras Reports, 198. See also 2 Indian Law Reports (Madras), 58. See also, 3 Ibid., (Bombay), 27.

4 Ibid., 404.

Ibid., 2.

Section 14 says :—Any person or persons interested in any Mosque, Temple or religious establishment or in the performance of the worship or of the service thereof or of the trusts relating thereto may, without joining as plaintiff, any of the other persons interested therein, sue before the Civil Court, the Trustee, Manager or Superintendent of such Mosque, Temple or religious establishment, or the member of any Committee appointed under this Act, for any misfeasance, breach of trust, or neglect of duty committed by such Trustee, Manager, Superintendent or member of such Committee in respect of the trusts vested in, or confided to, them respectively, and the Civil Court may direct the specific performance of any act by such Trustee, Manager, Superintendent or member of a Committee and may decree damages and costs against such Trustee, Manager, Superintendent, or member of a Committee and may also direct their removal of such Trustee, Manager, Superintendent or member of a Committee.

Section 15 says :—The interest required in order to entitle a person to sue under the last preceding section need not be a pecuniary, or a direct or immediate interest in such an interest as would entitle the person suing to take any part in the manage-

Jurisdiction of the Courts in religious matters.

594. The duty of individuals to submit to, and perform certain religious observances in accordance with the ritual, or conventional practice of their race, or sect is, in the absence of express legal recognition and provision, of imperfect obligation, and of a moral, not a civil, nature. Of such obligations, the present Civil Courts cannot take cognisance. And it is of great importance in this country that the Courts exercising their civil jurisdiction, as now provided, should carefully guard against entertaining suits, in respect of mere ritual observances, and the conduct of the various kinds of native religious worship and ceremonies, and of what, as incident thereto, may be due to the sacred character, or the religious rank and position of individuals. With such matters the Courts cannot properly deal, and if their jurisdiction extended to interference in

ment or superintendence of the trusts. Any person having a right of attendance, or having been in the habit of attending at the performance of the worship or service of any Mosque, Temple, or religious establishment, or of partaking in the benefit of any distribution of alms, shall be deemed to be a person interested within the meaning of the last preceding section.

Section 18 provides that no suit shall be entertained under this Act without a preliminary application being first made to the Court for leave to institute such suit. The application may be made upon unstamped paper. The Court, on the perusal of the application, shall determine whether there are sufficient *primâ facie* grounds for the institution of a suit, and, if in the judgment of the Court there are such grounds, leave shall be given for its institution. In calculating the costs at the termination of the suit, the Stamp duty, on the preliminary application, shall be estimated, and shall be added to the costs of the suit. If the Court shall be of opinion that the suit has been for the benefit of the trust, and that no party to the suit is in fault, the Court may order the costs or such portion as it may consider just to be paid out of the estate.

them, the law would be made instrumental in upholding and continuing the ceremonials and superstitious observances of idol-worship for the benefit merely of the few who profit by them.[a]

595. The rule however was held not to apply in the following case which arose in connection with the famous temple of *Srirungum* in the Trichinopoly District. There the suit was brought by the *Thenkalai* against the *Vadakalai* sect to establish their exclusive right to the *Adhyipaka Miras* of reciting certain religious text hymns or chants as against the defendants, further alleging that they engaged the incomes of the *Adhyipakam* for the discharge of their duties. The suit was dismissed by the High Court, on the ground that there was no cause of action observing that a reference to the schedules discloses nothing more than a list of cakes and offerings to which a money value is assigned. The Privy Council, however, reversed the judgment, remarking that the schedules are more than a mere list of cakes and offerings to which a money value is assigned, that they disclose a claim whether well founded or ill founded as of right to certain dues for services performed.[b] Exceptions to rule.

a 1 Madras Reports, 301. This suit was brought by a guru in the great Temple of Conjeveram to establish his right to certain honors and emoluments which were refused to him from factious feeling.

b 2 Indian Law Reports (Madras), 42, Privy Council case. See also 3 Ibid. (Bombay), 9. The *Thenkalai* (*then* south, *kalai* (கலை) philosophy, Sansk., *kalâ)* and *Vadakalai* sects *vada)* north, *Kalai* philosophy) are two sects of *Vaishanva* Brahmins whose headquarters seem to be in *Srirungum* in the Trichinopoly District. The outward mark of distinction between these sects is that the mark of the trident worn by the *Thenkalais* on the forehead ends in an abrupt curve, while that worn by the *Vadakalais* is a little further prolonged.

596. So also in a suit, which was brought to establish a right to receive certain honors in a temple, as appertaining to the office of priest, and to recover damages for the invasion of this right, the Court held the suit maintainable, saying that there was here no question of the regulation of religious ritual, or of a right to votive offerings, or payment of respect by the wardens and the worshippers of the temple. The question relates to a right appertaining to an office in the temple. It is a right claimed in connection with religious worship, which is not a mere matter of religious ceremonial, and which does not trench on the rights of the worshippers at a temple to show to the claimant, or to withhold from him reverence or respect. And in another case the Court said, the claim is for a specific pecuniary benefit, to which plaintiffs declare themselves entitled, on condition of reciting certain hymns, as in the *Srirungum* case. There can exist no doubt that the right to such benefits is a question which the Courts are bound to entertain, and cannot cease to be such a question, because claimed on account of some service connected with religion. If to determine the right to such pecuniary benefit, it becomes necessary to determine incidentally the right to perform certain religious services, we know of no principle which would exonerate the Court from considering and deciding the point.[a]

a 4 Madras Reports, 349; 6 Indian Appeals, 120. Gifts for religious purposes are valid, (though given by any one) almost under any circumstances. 1 Borrodaile's Reports, 394, 400.

2 Ibid., 314. The English rule of perpetuities does not apply to

597. The Courts will not enforce claims brought by one member of a family against another to compel him to pay his share of expenses, for the maintenance of the worship of the family idols.[a]

598. Property once granted for religious purposes can never, of course, become the subject of partition, or alienation, nor can a religious office be sold.[b] **Religious endowment, cannot be alienated.**

599. A manager of temple property is in the position of trustee for the founder, and cannot create permanent encumbrances to the injury of the endowed property. No prescription derived from the trustee can, in such cases, run against the heirs and representatives of the founder.[c] **Powers of Manager of religious endowments.**

600. Nor can a manager alienate the whole of the family property, nor even a considerable portion thereof, as a gift to an idol; nor can a widow grant property to an idol without the consent of the reversioners.[d]

gifts to idols. 2 Bengal Reports, O. C., 47; 4 Ibid., 103. *Secus*, where the beneficial ownership is vested in others and the property is burdened with a trust for the benefit of the idol. 3 Indian Law Reports (Bombay), 84.

a 5 Sutherland's Weekly Reporter, 29.

b 7 Madras Reports, 217.

If the property remained as the property of the several members of the family subject to a trust in favor of the idol and only the profits of the lands were dedicated to the worship of the idol, the surplus proceeds being distributed among the members themselves, then the property is partible. 4 Indian Law Reports (Calcutta), 56 following *Sonatun Bysack's* case, 8 Moore's Indian Appeals, 66.

c Sutherland's Weekly Reporter, 1864, 157.

d 1 Ibid., 48.

601. The paid manager of the affairs of a Pagoda has no power, as such, to encumber the Pagoda property, or to settle large outstanding demands against it. Persons dealing with such managers are bound to enquire into the extent of their authority.[a]

602. A manager of property dedicated to religious purposes may borrow money for the worship of the idol, if there is necessity for it, his powers in that respect being similar to those of a manager of an infant heir.[b]

603. Under Hindu law, a permanent alienation by a manager of endowed property is not absolutely null and void. If made under circumstances of necessity, it is valid, such as for the repairs of the temple, idol, &c.[c]

604. Ordinarily, a mortgage of endowed property by a manager is *ultra vires.*[d]

Manager of religious endowment in some position as Hindu widows.

605. The case of a person alienating property, which he holds as manager of an idol, is analogous to that of a Hindu widow alienating ancestral property, and the question, as regards the power of a manager to grant a *patnee* of endowed land is, whether, looking to all the circumstances of the case, the alienation was a prudent and wise act, in respect of the purposes for which he was manager:

a 1 Madras Reports, 298.
b 2 Indian Appeals, 145; 4 Ibid., 52; 12 Bombay Reports, 214.
c 7 Bengal Reports, 621; 21 Sutherland's Weekly Reporter, 41; 13 Moore's Indian Appeals, 270.
d 14 Sutherland's Weekly Reporter, Civil Rulings, 101.

and in estimating the validity of a purchase of the *patnee* rights, it ought to be considered, whether the purchasers satisfied themselves, as far as they could, that there was a fair and sufficient ground of necessity for the alienation.[a]

Manager's right cannot be sold in execution of decree.

606. A judgment-debtor's right, as manager, to perform the service of an idol cannot be sold in execution of a decree; nor can his right to the surplus profits of the property be sold, so long as that right is unascertained and uncertain.[b]

607. On the decease of a manager or trustee, the trust descends to his natural heirs unless there is anything to the contrary in the terms of the trust.[c]

A female may be manager.

608. A female may be the manager of a religious endowment.[d]

CHAPTER XII.

CONTRACTS AND MORTGAGES.

Hindu law of contracts supplanted.

609. The Hindu law of contracts is, to a great extent, supplanted by the Indian Contract Act (Act

a 12 Sutherland's Weekly Reporter, 299.

b 7 Ibid., Civil Rulings, 266.

c 4 Bengal Reports, O. C., 182. Where the Manager is an ascetic, his successor is generally nominated by him shortly before his death. Instances of this kind of management are those of the great *Ramaiswarum* Pagoda in the Madura District, and *Vanamamullay Mutt* in the Tinnevelly District. The trustee of the former is of the *Siva* sect and is called *Ramanada Pandarum:* the latter is a *Vaishnava* Brahman always spoken of as the *Vanamamullay Jeeyar* whose *Mutt* possesses great wealth and numbers of disciples in all parts of India.

d 16 Sutherland's Weekly Reporter, 282.
4 Madras Reports, 23.

IX of 1872), and by the Specific Relief Act (Act I of 1877).

Similarity of Hindu law to English.

610. The Hindu law of contracts is somewhat similar in its general principles to that of the English law. Note for instance, the following *dicta* of Hindu lawyers.

Purchases.

611. As to *purchases*, Nareda thus ordains: "A buyer ought at first to inspect the commodity and ascertain what is good and bad in it; and what after such inspection he has agreed to buy, he shall not return to the seller, *unless it had a concealed blemish*."[a]

Duress.

612. As to *duress*: This will include cases of fear and compulsion in which, according to Jagganatha, "the man is not guided by his own will, but solely by the will of another. If terrified by another, he gives his whole estate to any person for relieving him from apprehension, his mind is not in its natural state; but after recovering tranquillity, if he give anything in the form of a recompense, the donation is valid."[b]

Fraud.

613. So also as to *fraud*: Advantage is not to be taken of what was not seriously meant. A true assent, according to Colebrooke, implies "a serious and perfectly free use of power both physical and

a 1 Strange's Hindu Law, 306, 307.
W. H. Macnaghten's Hindu Law, 123, 2nd ed.

b 1 Strange's Hindu Law, 273, 274.
W. H. Macnaghten's Hindu Law, 123, 124, 2nd ed., citing Colebrooke on Obligations and Contracts.

moral. This essential is wanting to promises made in jest or compliment."[a]

The consideration of the contract must be legal.

614. And not only must the parties be in a legal state to contract, but the subject, or cause of their contracting, must be a competent one, according to the apprehension of the law. And wherever money has been paid on an illegal consideration, it shall be recovered back again by the party who improperly paid it.[b]

Revocation.

615. Again, as an excessive or illegal gift may be resumed, so may contracts be rescinded, the law in the one case and in the other nearly identifying.[c]

616. He who would disaffirm a contract entered into by mistake must do so within a reasonable time, and will not be allowed to do so, unless both parties can be re-placed in their original position.[d]

a 1 Strange's Hindu Law, 273.
W. H. Macnaghten's Hindu Law, 124, 2nd ed.

b 1 Strange's Hindu Law, 274, 275.
W. H. Macnaghten's Hindu Law, 128, 2nd ed.
See too 2 Madras Reports, 187, citing *Ward* v. *Lloyd*, 6 Man. and Grang., 785, 189. Where it was held that a contract to pay on an illegal consideration could not be enforced. *Keir* v. *Leeman*, 6 Q. B., 308, Ex. Ch. in error, 2 Q. B., 371. See also the well-known case of *Collins* v. *Blantern*, 13 Sim., 513.
Ibid., 243.
Ibid., 128.

c 1 Strange's Hindu Law, 278.
W. H. Macnaghten's Hindu Law, 126, 127, 2nd ed.

d 1 Madras Reports, 390, citing *Johnson* v. *Johnson*, 3 Bos. and Pul., 170. See also Wms. Saunders, 169 d. The purchaser cannot recover the purchase money in equity when the conveyance has been executed by all necessary parties, and he is evicted by a title to which the covenants do not extend. *McCulloch* v. *Gregory*, 1 K. and J., 291 per *Wood V. C.*

The contract need not be in writing.

617. The Hindu law in no instance requires that a contract should be in writing, though it sets upon all occasions a due value upon written evidence. Oral evidence, however, of the discharge of an obligation by writing, is admissible. This is a well known principle of the English law of evidence.[a]

Law and usages of Hindus to regulate contracts between Hindus.

618. The law and usages of Hindus must regulate all matters of contract between Hindus, subject of course to the provisions of the Contract Acts.[b]

Heads of contract.

619. Matters relating to contracts may be considered with reference to bailment, pledge, sale, debt.[c]

Bailments.

620. According to Hindu law, bailments may be regarded under a triple point of view, *first*, where

a 1 Strange's Hindu Law, 277.
1 Madras Reports, 101, and Reporter's Note.
2 Madras Reports, 37.
Ibid., 412.

b 1 Ibid., 9. Among Hindus no contract, generally speaking need be in writing. And even with regard to others the Contract Act has repealed the sections of the English Statute of Frauds, (29 Car. V, and 9 Geo. IV), which provided that certain contracts in the Presidency Towns in cases governed by English law should be in writing. There are however certain contracts which are still to be evidenced by writing: *e.g.*, *Acceptance* of a Bill of Exchange in cases governed by English law (Act VI of 1840); *Puttahs* and *Muchilkas* between landlords and tenants under the Rent Recovery Acts: contract with Municipal Commissioners for sums over Rs. 100: and certain contracts under the Registration Acts.

c 1 Strange's Hindu Law, 278. On these heads, see further Contract Act. In Roman law loan, deposit, and pledge are called *real* contracts because they are not completed till something has passed from one to another: other contracts such as sale are completed by *consent* alone.

the object and benefit involved are entirely on the side of the bailor, such as the simple deposit and the *commission without reward (mandate): secondly,* loans for use where the bailee or borrower alone is benefited: *thirdly,* mutual trusts, pledges, and the various kinds of hiring in which both parties have an interest.[a] These three divisions include the six sorts of bailment, laid down by *Lord Holt* in *Coggs* v. *Barnard.*[b]

621. With regard to the first class of bailments, it may be observed generally that reasonable care as well as perfect fidelity are expected from a gratuitous bailee. Or, as stated by *Vrihaspati,* "the very thing bailed must be restored to the very man who bailed it, in the very manner in which it was bailed." The bailee will only be liable for gross negligence. What is gross negligence is a question on the facts of each particular case.[c]

Liability of gratuitous bailee.

a 1 Strange's Hindu Law, 280. A *mandate* is a contract by which a man confides the management of some business to another who undertakes to perform it without pay or reward. It is essential to this contract that it should be gratuitous. Institutes of Justinian, 3, 27.

b 1 Smith's Leading Cases. It is hardly necessary to state that the Roman Law pre-eminently underlies not only the English law of bailments but that of Europe and America.

c 1 Strange's Hindu Law, 281—286.
As to liability of a gratuitous bailee, see 2 Madras Reports, 449. The depositary is bound to restore the thing with all its profits and accessories. These are the principles of the Roman law. Digest, 1, 6, 5, 2. The principles of the Roman law of *deposit* have been adopted in European and American law with reference to inn-keepers, lodging-housekeepers, ship masters and others. In England their liabilities are regulated by Statutes. See 26 and 27 Vict., c. 41.

Loans for use.

622. With reference to loans for use, in contradistinction to loans of money, or other things for consumption, the bailee is required to exercise extraordinary care, and he is answerable for slight negligence, though not for inevitable accident, or irresistible force.[a]

623. Like all other bailments, the one in question stipulates for the purest good faith; and, therefore, where a special use is in the contemplation of the borrower at the time of borrowing, he should disclose it, if he wishes to be safe.[b]

Mutual trusts.

624. Mutual trusts have the same rules applied to them, only with a reciprocal, instead of a single application.[c]

Provisions of Contract Act.

625. According to Section 148 of the Contract Act, a bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished,

a 1 Strange's Hindu Law, 286. Section 151, Indian Contract Acts abolishes all distinctions as to degrees of care in bailees. See *post*. There is a tendency to the same effect in English law. See *Giblin* v. *McMullen*, Law Reports, 2 Privy Council Cases, 317. Under Roman law the loan for use is a real contract and is called *commodatum*. The loan is gratuitous otherwise it would be a letting for hire. *Vrihaspati's* definition above cited would equally apply to a *loan for use*. A *loan for consumption* in Roman law is called *mutuum* and consists of things which might be numbered, weighed or measured, *e.g.*, money, corn, &c. In this case the borrower was not bound of course to return the identical thing, but as much of the same kind and quality.*

b Ibid., 287. See section, 609 *post*.

c Ibid., 288.

* Institutes of Justinian, 3, 15.

be returned or otherwise disposed of, according to the directions of the person delivering them.

Explanation.—If a person already in possession of the goods of another, contracts to hold them as a bailee, he thereby becomes bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment.[a]

626. According to Section 151 of the Indian Contract Act, however, in all cases of bailments, the bailee is bound to take as much care of the goods bailed to him, as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.

627. According to Section 154 of the Contract Act, if the bailee makes any use of the goods bailed, which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damages arising to the goods, from or during such use of them.

628. A pledge is an accessory contract *(pignus naturâ suâ est tantummodo jus accessorium)*, being a bailment of something to the creditor on a loan of money; which may be for security only, or for security joined with use *(bhogyadhi, or usufructuary* Pledges.

a The liabilities of carriers are regulated by Act 3 of 1865, Act 18 of 1854 amended by Acts 13 of 1870 and 25 of 1871. So far as those Acts do not apply, carriers are subject to the Contract Act. The whole law of bailment for India is regulated by the Contract Act.

mortgage); and in this respect it may be compared with the *vivum radium* and the *mortuum radium;*— the *living* and the *mort*gage in English law.[a]

Pledge under Contract Act.

629. According to Section 172 of the Contract Act, the bailment of goods as security for payment of a debt, or performance of a promise, is called pledge. The bailor is, in this case, called the pawnor. The bailee is called the pawnee.

Pledge under Hindu law.

630. According to Hindu law, in the case of a pledge for use, the debt and interest being extinguished by the use or otherwise, it reverts to him who made it; on the other hand, any part of the debt remaining upon expiration of the time for payment, the pledgee or creditor may continue to use it, making a demand for payment, and giving notice of his intention to the debtor, or his repre-

a 1 Strange's Hindu Law, 288, 289. Under English as well as Roman law a power of sale accompanies the pledge.

2 Ibid., 463, 464, Colebrooke and Ellis.

The *vivum radium*, or living pledge, is when a man borrows a sum of money of another (suppose 200*l.*) and grants him an estate as of 20*l. per annum*, to hold till the rents and profits shall repay the sum borrowed; in this case the land or pledge is said to be *living;* it subsists and survives the debt, and immediately on the discharge of that reverts back to the borrower. (Holth. Law Dic., 2nd ed.) The *mortuum radium*, or dead pledge, is where lands are conveyed by one to another as a security for money lent, either in fee or for a term, with a condition that if the money be re-paid on a certain day with interest, the lands shall be re-conveyed to the borrower, and with a further proviso, that if default shall be made in re-payment of the money, the person lending the money shall hold the lands without any interruption from the borrower. (Will. Real Pro., 349, *et seq.*, 4th ed., Coote on Mortgages, 4, *et seq.*, 3rd ed.) As to pledges, see further Contract Act, Chapter IX.

sentative; or if it be a pledge for *security* only, he may, under the like circumstances, begin to use it, if capable of use, without injury to the substance, giving like notice; while an unjustifiable use of one, being a violation of an implied agreement, works a forfeiture of interest.[a]

631. By usage, contrary perhaps to the strict letter of the law, a pledge is assignable; but the assignment (which can only be for an equal or less sum than the sum advanced upon it), should correspond with the original contract; from which any variation might embarrass the redemption on the part of the owner by whom it was first pledged.[b]

Pledge assignable.

632. A pledge by the owner of the same thing, at the same time, to two different persons, for the full value to each, is fraudulent: and as between the different pledgees, the first prevails, subject to priority of possession; or there may be an equitable adjustment of the right, according to circumstances.[c]

Pledge of same thing to two different persons improper.

633. There may be a mortgage of a chattel without possession, or hypothecation, as in the case of immovable property.[d]

Hypothecation of chattel.

a 1 Strange's Hindu Law, 289. A summary of Hindu mortgage.

b Ibid.

c Ibid. It would not be fraudulent, if the subject-matter covered both pledges. This was also the Roman law.

d 3 Allahabad Reports, 54. Hypothec is a security established by law to the creditor upon a subject which continues in the debtor's possession. Digest 20, 1.

Hiring. 634. The same rules that apply to the other bailments apply also to hiring of all kinds.[a]

Mortgages. 635. There is a difference between a mortgage and a pledge: the former conveys an absolute interest in the goods, and the latter only a special property in them.

636. As to mortgages, there are three different kinds in India.

Simple mortgage. 637. The first is a *simple* mortgage, in which the mortgagee has a right to sell the property mortgaged to him as a collateral security on failure of the mortgagor to pay. In this case, the former is not entitled to anything more than the debt with costs. This form of mortgage is the same as hypothecation under the civil law, and the mortgagor incurs in it a personal liability.

Conditional sale. 638. The second is a *conditional* sale, in which the mortgagee may become the absolute owner of the property, on failure of the mortgagor to pay. In this case the mortgagee gets the property whatever may be its value, the contract executing itself. In this form of mortgage, the mortgagor incurs no personal liability, in the absence of any express agreement to the contrary.[b]

a 1 Strange's Hindu Law, 292—295. Hiring is two kinds: hiring of things and hiring of work.

b 13 Moore's Indian Appeals, 561; 7 Select Reports (Bengal), 92; 7 Sutherland's Weekly Reporter, 196.

639. The third is a *usufructuary* mortgage, in which the mortgagee enters into possession and repays himself out of the rents and profits. Here also, generally speaking, the mortgagor incurs no personal liability, and the mortgagee must look exclusively to the land for payment.[a]

Usufructuary mortgage.

640. There is also a kind of mortgage called an *equitable* mortgage more frequent in England than in India, *e.g.*, where money is borrowed upon the deposit of title deeds, the law implies that the property comprised in the deeds is held liable for the money. No particular form of words is necessary to constitute a mortgage.[b]

Equitable mortgage.

641. A mortgagor in possession is not liable to account for the rents and profits. He must not, however, injure the security of the mortgagee, and he must not commit wilful waste. He, however, is

Mortgagor generally need not account.

a See however 2 Moore's Indian Appeals, 487.

b The deposit may be for an antecedent debt upon a fresh loan. 1 Leading Cases (Equity), 541, 2nd ed. An equitable mortgage means that a debtor has in equity created a charge on his estate in favour of his creditor without having clothed such creditor with the legal estate. In fact such a mortgage as can be enforced in a Court of Equity only, and not at law. The difference between a legal and an equitable mortgage is this: a legal mortgage passes the entire legal interest in the subject-matter to the mortgagee and the mortgagor has but an equity of redemption: whilst an equitable mortgage merely gives the mortgagee a right in equity to have a complete title. Equity will decree a sale on a deposit of title deeds. *Matthews* v. *Goodday*, 5 L. J. Rep. N. S., 572. A subsequent mortgagee who obtains the legal estate without notice will prevail over the prior equitable mortgagee.

bound to account, if he retain possession against the terms of the mortgage, for he will then be liable for mesne profits. He is also liable for the mesne profits from the time of foreclosure.[a]

Mortgagee must account.

642. The mortgagee in possession, (even in a usufructuary mortgage, on payment of the principal by the mortgagor), is always bound to account for the rents and profits. Even if he assigns the mortgagee without the consent of the mortgagor.[b]

Mortgagee entitled to outlay for repairs.

643. The mortgagee is however entitled to any outlay made by him for repairs, and interest at the rate given by the mortgage is allowed on the sum so expended. The repairs, however, should be necessary.[c]

And for improvements, &c.

644. So also with regard to *improvements*, they must be necessary, or made with the consent of the mortgagor. Where a mortgagee in possession has received notice of a puisne mortgage, he must account to the puisne incumbrancer for the surplus rent paid to the mortgagor, if he has no notice, he need not account.[d]

a 12 Moore's Indian Appeals, 157.
10 Ibid., 340.

b Smith's Manual of Equity, Secs. 316, 322, &c., 10th ed. So long as the mortgagor continues in possession by the permission of the mortgagee he is entitled to take the rents and profits in his own right without rendering any account whatever to the mortgagee, though the property is an insufficient security. Smith's Manual of Equity, 315, 10th ed.

c 9 Sutherland's Weekly Reporter, 488.
5 Bombay Reports, 114, 116. Coote on Mortgages, 303, 3rd ed.

d 2 Moore's Indian Appeals, 487.

645. If a mortgagor mortgage two or more properties to the same person, he will not be allowed to redeem the one without the other.[a]

Mortgages to same person redeemed together.

646. A prior mortgagee, having purchased, may still use his mortgage as a shield against the claims of subsequent mortgagees. In this case, the Judges of the Madras High Court, following the Roman law, declined to adhere to the rule of English law, which refuses this privilege to the mortgagee, unless the mortgage is kept alive as a separate security, observing that "the rule of the Civil law is the true rule, and one to which the minds of English Judges are gradually tending."[b]

Prior mortgagee may protect himself against subsequent incumbrancer.

647. The English doctrine of "tacking" as laid down in the leading case of *Marsh* v. *Lee*, by *Lord Hale*, is also not adopted in India.[c] The doctrine is thus stated in the head-note of that case: If a third mortgagee having advanced his money without notice of a second mortgage, afterwards bring in a first mortgage or statute, though it be *pendente lite*, pending a bill brought by the second mortgagee to redeem the first, yet the third mortgage having obtained the first mortgage, or statute and being the law

"Tacking" not applicable to India.

a 6 Bombay Reports, 89.

b 7 Madras Reports, 229. According to English law such a purchaser is postponed to subsequent incumbrances of which he has notice, unless distinct steps are taken to keep his own alive. *Watts v. Symes*, 1 De G. M. and O. 240; *Garnett* v. *Armstrong*, 4 Dru. and War. 198.

c 11 Sutherland's Weekly Reporter, 310.

1 Leading Cases, Equity, 494, 2nd ed. "*Tacking*" is the unity of two incumbrances in order to postpone an intermediate one which is prior in point of time to the incumbrances "*tacked*."

on his side and equal equity, he shall thereby squeeze out and gain priority over the second mortgagee.

Rights and duties of mortgagee.

648. If the mortgagor should refuse, or be incapable of delivering the mortgaged property, the mortgagee may sue him at once for the recovery of the money: or if the mortgagee is disturbed in his possession by the mortgagor, or by any claiming through him, he may sue for the balance due to him.[a]

649. A mortgagee can only enforce a power of sale by judicial process, and not, as in England, under the mortgage instrument, without the interference of the Court. It is considered that this power, if granted, would be grossly abused in this country.[b]

650. Generally speaking, a mortgagee is not bound to proceed in the first instance against the property pledged to him. He may proceed against any property in possession of the mortgagor, even although the decree should declare that he should first proceed against the property pledged.[c]

a 4 Moore's Indian Appeals, 444.

b Macpherson on Mortgages. This is so in Bengal under Statutory enactments. See Regulation I of 1798, and Regulation XVII of 1806. This latter Regulation had no retrospective effect upon titles, which had become absolute before it came into force, 5 Sutherland's Weekly Reporter, 88; 1 Prideaux's Precedents.

c 14 Sutherland's Weekly Reporter, 209. The fact that a money decree has been obtained on a bond by which property has been mortgaged does not destroy the lien on that property. It is open to the plaintiff to establish the right on the bond as well as on the decree. 4 Indian Law Reports (Calcutta), 29. A purchaser under a mortgage decree purchases all the rights of the mortgagee as well as of the mortgagor in the mortgaged property. 4 Indian Law Reports (Calcutta), 817.

24 Sutherland's Weekly Reporter, 305.

651. A mortgagee has no right to share in proceeds of a Court sale, when the property is sold subject to his mortgage, to the detriment of unsecured creditors. He may perhaps, however, obtain the surplus after they are paid.[a]

652. A mortgage is indivisible, and a part cannot be redeemed without the whole. To this there is one exception, viz., where the equity of redemption in a part of the mortgaged estate is vested in the mortgagee, or if more than one, in *all* the mortgagees. For a mortgagee who, has acquired by purchase a part of the mortgagor's rights and interests, is not entitled to throw the whole burden of the mortgaged debt on the remaining portion of the equity of redemption, in the hands of one who has purchased it at a sale, in execution of a decree against the mortgagor. Each has bought subject to a proportionate share of the burden, and must discharge it.[b]

Exception to rule as to indivisibility of mortgage.

653. Where, however, *one* of several mortgagees purchases a part of the estate, this principle will not apply, and a purchaser of part must redeem on payment of the whole debt.[c]

When exception does not apply.

654. Where one of several purchasers of portions of the mortgaged estate pays the whole of the

Purchasers of mortgaged property entitled to contribution.

a See however, 14 Sutherland's Weekly Reporter, 209, 210.

b 2 Agra Reports, 88, per *Morgan, C. J.* Where the property mortgaged consists of *distinct* portions, independent of each other, the purchaser of one of these portions might redeem it without redeeming the whole. And if the mortgagee had obtained a decree and was enforcing it, the purchaser ought to pay the sum into Court. 4 Indian Law Reports (Calcutta), 72, citing 13 Moore's Indian Appeals, 404.

c 5 Allahabad Reports, 149.

mortgage debt, in order to save the particular portion of the mortgaged land purchased by him from being sold by the mortgagee, he is entitled to contribution from the other purchasers, according to the value of the property possessed by each.[a]

Drishtabandhaka, or hypothecation.

655. Though to ensure the efficacy of a pledge, or mortgage, the Hindu law inculcates the necessity of possession, the authorities to this purpose are not applicable to a sort of mortgage termed *Drishtabandhaka* (hypothecation of visible property) common in India, by which the pledge is assigned to the creditor as a security without possession, or intention of possession, till the stipulated time arrive.[b]

English law recognises hypothecations.

656. The English law recognises hypothecations in the vendor's lien for unpaid purchase money.

Definition of hypothecation.

657. The contract of hypothecation is thus defined by a modern jurist: "*Et quia hypotheca constituitur desuper rebus ideo dicitur jus in re, seu jus reale vel actio realis, quia per illam non obligatur persona debitoris sed res, et sequitur fundum et datur contra possessionem.*" (And because *hypothecation* is based upon *things*, it is therefore called *a right in a thing*, whether it be a *real right*, or a *real action*, since by it the *person* of the debtor is not bound but

a 12 Sutherland's Weekly Reporter, 291.
1 Story's Equity Secs. 477, 484.; 4 Indian Law Reports (Calcutta), 369. This is a strong case, for the purchaser who paid off the mortgage had undertaken in his sale deed from the mortgagor to pay off the mortgage, yet he obtained contribution from the other purchaser.

b 1 Strange's Hindu Law, 289.

the thing, and it not only follows the land but is allowed in spite of possession). Its remedies seem to show clearly that when land is the subject of the hypothecation, it is necessarily a contract which gives an interest in immoveable property, for it is clear that any subsequent sale must be made subject to it.[a]

658. A creditor suing under such a contract must prove that there was an actual pledge, and that the land was part of the debtor's estate at the time of pledge.[b]

Hypothecation to be registered.

659. An instrument of hypothecation is a mortgage instrument, and as such should be registered.[c]

Equity of redemption.

660. Under the common law of England, the mortgagee had not only the possession, but absolute property of the land on the debtor's failing to perform the condition. But equity has always regarded a mortgage as redeemable till foreclosure; and in enforcing a lien, it gives the debtor an opportunity of barring the mortgage, or sale of the property, to which the lien extends, by paying the amount due with interest by a day named by the Court.[d]

a 2 Madras Reports, 51, citing *Neguzantius*. In connection with hypothecation, see 3 Madras Reports, 241.

b Ibid.

c Ibid., 108.

d 2 Ibid., 51. Under English law a mortgagee may after default evict the mortgagor, or file his bill of foreclosure, or proceed to sell the premises, or appoint a receiver; he has a right to tack a third mortgage to a first, where he made the further advance without notice; he may evict any lessee of the mortgagor subsequent to the mortgage, and may give the tenant who has such prior to the mortgage notice to payment and in default distrain, &c. Coote on Mortgages, 3rd ed.

How conditional sales to be regarded.

661. In accordance with these principles it was held that a *drishtabandhaka* which names a time for payment of the money borrowed, and stipulates that, on default, the mortgagee shall be put into exclusive possession and enjoyment of the property, will not be treated strictly as a conditional sale, even though the instrument expressly provide that, on default, the transaction shall be deemed an outright sale; and in a suit by the mortgagee for possession, the Court, in decreeing the right thereto, will give the mortgagor a day for redeeming.[a]

Privy Council decisions as to mortgages by conditional sale.

662. With reference to the above decisions of the Indian Courts on mortgages by a conditional sale, the Privy Council observe that, up to the year 1858, the Courts in Madras gave effect to such sales: such being in accordance with the ancient law of India: that however subsequently to this, a current of decisions set in, inaugurated by the late Sudder, in which these sales were treated as penalties, and the principles of English Courts of Equity adopted, giving the mortgagor notwithstanding the right to redeem. After reviewing all the cases in Madras and in Bombay, for in Bombay a similar change was effected (vide 9 Bombay Reports, 69,) they held that these decisions were untenable. Under the law so laid down persons, who fifty years before had acquired, as the law then stood, an indefeasible title in lands, which they had ever since held and enjoyed *in optima fide*, became liable to be dispossessed and compelled to account for mesne profits, at the suit of

a 1 Madras Reports, 460; 2 Ibid., 420; 7 Ibid., 395; 8 Ibid., 31.

the representatives of the mortgagor, against whom the sixty years' rule of limitation had not yet run.[a]

Mortgages before and after 1858 how regarded.

663. On a stale claim to redeem a mortgage and dispossess a mortgagee, who had before 1858 acquired an absolute title, there would be strong reasons for adopting the ancient law, as to mortgages by conditional sale. In the case of a security executed since 1858, there would be strong reasons for recognising and giving effect to the Madras authorities, with reference to which the parties might be supposed to have contracted.[b]

664. When a *bonâ fide* sale is accompanied by a power to re-purchase, this will not make the transaction a mortgage, if such does not appear to have been the intention of the parties. The best general test of such intention is the existence, or non-existence of a power, in the original purchaser to recover the sum named, as the price for such re-purchase: if there is no such power, there is no mortgage.[c]

665. It is incorrect to suppose that the condition for re-purchase, with a stipulation for an absolute sale, in case of failure to pay at the time, is a penalty which cannot be enforced.[d]

a See 7 Madras Reports, 395, in which the mortgage deed was executed in 1811, the title of the mortgagee becoming absolute in 1816, while the suit was brought just as the limitation was dying out. Other instances are also in the Reports, 2 Indian Appeals, 241.

b 2 Indian Appeals, 255.

c 1 Madras Reports, 460, Note.

d Ibid., 420.

Re-purchase. 666. It has been held that it is quite competent to parties to sell with a condition for re-purchase at a particular time; then, in case of non-payment at the time, there is no equity to relieve against the sale. It is the intention of the parties which governs, and that intention may be shown by the deed itself, by other instruments, or even by oral evidence.[a]

Privy Council decisions as to re-purchase. 667. With regard to these decisions, the Privy Council observe that the distinction between sales with a condition for re-purchase and mortgages by conditional sale being made to depend upon the intention of the parties to the original transaction, provable by oral evidence, opens a wide field of litigation, and to leave much to the discretion of the Judge in each particular case; and the inquiry is embarrassed by the circumstance that, the parties whose intention is to be ascertained cannot, in the case of an ancient transaction, have contracted with reference to a state of law, which the Courts of Madras have decided no longer exists.[b]

Waiver of mortgagee's right to purchase. 668. A party mortgaged land to another, the mortgage instrument providing that the mortgagor should be entitled to purchase the land, if it were not redeemed by a specified date. After this date, the mortgagee accepted from the mortgagor a small sum in part-payment of the mortgage-money. It

a 1 Madras Reports, 420, citing *Alderson* v. *White*, 2 De G. and J., 97; 7 Madras Reports, 6.

b 2 Indian Appeals, 254.

was held that this was a waiver by the mortgagee of his right to purchase.[a]

Mortgagee not bound to forego right of action in certain circumstances.

669. Where a mortgage-bond contained an agreement to re-pay the money with interest by a certain day, and stipulated that if the mortgagor failed to pay the amount, the mortgagee should be put in possession of the land and he might enjoy it; and that when the mortgagor had the means he would redeem the land and pay the debt with interest and take back the bond, it was held that, on the mortgagor's default, the mortgagee might sue for the money, and that he was not bound to accept the land and forego his right of action.[b]

Sale and its incidents.

670. The next contract is that of sale. Sale is thus defined in Section 77 of the Contract Act: Sales are the exchange of property for a price. It involves the transfer of the ownership of the thing sold from the seller to the buyer.

671. Section 78 says:—Sale is effected by offer and acceptance of ascertained goods for a price, or of a price for ascertained goods, together with payment of the first, or delivery of the goods, or with tender, part-payment, earnest, or part delivery, or with an agreement, express or implied, that the payment or delivery, or both, shall be postponed.

672. Where there is a contract for the sale of ascertained goods, the property in the goods sold passes to the buyer when the whole or part of the

a 1 Madras Reports, 69.
b Ibid., 114.

price, or when the earnest is paid, or when the whole or part of the goods is delivered.[a]

673. If the parties agree expressly, or by implication, that the payment or delivery, or both, shall be postponed, the property passes as soon as the proposal for sale is accepted.

674. A thing sold and not delivered (subject to any special agreement) is at the risk of the vendor; so that if, while it remains unduly in his hands, its value sink, he must make it good with an attention to the eventual profit, where it was purchased for exportation; the same obligation attaching by whatever means it may be lost.[b]

675. Where the price has not been stipulated, the law implies a reasonable one *(quantum valuit)* to be settled in case of dispute by merchants.[c]

Damages for breach of contract.

676. If instead of paying down the price, *earnest* be paid, and the buyer afterwards break the agreement, the earnest is forfeited; and if in such case the seller break it, he is liable to re-pay the earnest two-fold; and not only double the earnest money, but also damages for the non-delivery.[d]

a 4 Indian Law Reports (Calcutta), 801. In this case the buyer wished to repudiate the purchase on the ground that the bulk did not correspond with the sample. It was held he was precluded because he might have discovered the inferiority by using "ordinary diligence."

b 1 Strange's Hindu Law, 303. See however Contract Act, Sec. 86. As to sale generally, see Contract Act, Chap. VII.

c 1 Strange's Hindu Law, 303. See Contract Act, Sec. 89.

d 1 Strange's Hindu Law, 303.
1 Madras Reports, 9 applies this principle of Hindu Law.

677. In an action of damages for non-delivery of goods, it was held that, before the plaintiffs could recover, they must show that they paid, or tendered the amount stipulated, and that the vendor's rights under the contract cannot be controlled by the course of dealing between the parties.[a]

678. Where a vendor contracts to deliver goods within a reasonable time, and payment is to be made on delivery, if, before the lapse of that time, he merely expresses an intention not to perform the contract, the purchaser cannot at once bring his action, unless he exercise his option to treat the contract as rescinded.[b]

679. In a suit for damages for breach of contract to deliver goods, it is not absolutely essential that there should be an allegation in the plaint that plaintiff was willing to pay on delivery.[c]

a 2 Madras Reports, 193.

Where a time is fixed for delivery, the rule in such cases is that the measure of damages is the difference between the price agreed on and that which goods of a like description and quality bore at the time when the goods contracted for ought to have been delivered. When no time is fixed for delivery, then it is the difference between the price agreed on and the price at which similar goods could have been obtained on the lapse of a reasonable time for delivery. 1 Madras Reports, 168. As to delivery, see Sec. 90, Contract Act.

b 1 Madras Reports, 162. When he may go into the market and supply himself with similar goods and sue upon the contract *at once* for any damage then sustained. *Leigh* v. *Paterson*, 8 Taunt., 540; *Philpotts* v. *Evans*, 5 M. and W., 475; *Hochster* v. *DeLatour*, 2 E. and B., 678. See Sec. 39, Contract Act; 4 Indian Law Reports (Calcutta), 252.

c 7 Madras Reports, 364.

680. Where the matter rests on the original agreement, and the vendee, upon its being tendered, refuse to accept the commodity he has bought, there is, with regard to him, an end of the contract; and the owner may dispose of the article as he pleases, the vendee being responsible for any loss resulting from his not having completed his purchase, but he is not entitled to any profit.[a]

Penalty and liquidated damages.

681. Where parties agree that in case of a breach of contract a sum shall be paid, the amount will be regarded as liquidated damages, which the Courts will enforce, and not as a penalty which they will relieve. Act XXVIII of 1855 is a conclusive proof, too, that the intention of the legislature is that, parties shall be left to make, and be compelled to stand by their own bargains.[b]

a 1 Strange's Hindu Law, 303. See Contract Act, Sec. 107.

b 2 Madras Reports, 451. *Liquidated damages* is where the amount to be recovered is fixed and certain as in an action of debts. *Unliquidated,* share the amount to be recovered is uncertain, as where an action is brought for an assault. The legal operation of a penalty is, not to cause a forfeiture of the whole amount, but only enough to satisfy the actual damage sustained. The tendency, however, of both Courts of Law and Equity is to draw no distinction between penalties and liquidated damages, and to interfere as little as possible with the expressed intention of the contracting parties. The doctrine of Roman law on the subject is that a penalty is recoverable. All that was required to make the penalty recoverable was a valid principal stipulation and the lapse of the time. So far from a penalty being void in the Roman law when it has the collateral object of securing the performance of a valid principal obligation, it was always recoverable when that obligation was not fulfilled. The great Roman lawyers knew nothing of the childish distinction between *penalties* and *liquidated damages:* they considered the *stipulatio pœnæ* when used as a *pactum adjectum* as a fixation of the damages. Per

682. The mere use of the term "penalty," or the term "liquidated damages," does not determine the intention of the parties to a written instrument, but like any other question of construction, it is to be determined by the nature of the provisions, and the language of the whole instrument.[a]

683. One circumstance, however, is of great importance towards the arriving at a conclusion; if the instrument contains many stipulations of varying importance, or relating to objects of small value calculable in money, there is the strongest ground for supposing that a stipulation, applying generally to a breach of all, or any of them, was intended to be a penalty, and not in the way of liquidated damages.[b]

684. The rule of construction, therefore, is that, although the stipulation may be held to be a penalty, and therefore not payable upon a breach of any particular stipulation, the resulting damage from which is strictly measurable in money, still the penalty might properly be taken as the amount of damages measured by the parties themselves, in case of an entire non-performance.[c]

Holloway J. in Regular Appeal No. 45 of 1865; 2 Madras Reports, 451. See however, 6 Ibid., 258, per Innes and Kindersley, JJ.

2 Madras Reports, 205.

a 12 Moore's Indian Appeals, 229.

b Ibid.

c 2 Madras Reports, 451, citing 12 Moore's Indian Appeals, 229. The English cases at *law* upon which this rule of construction is based are *Sparrow* v. *Paris*, 3 Hurl. and Nor., 599; *Kemble* v. *Farren*, illustrated in *Glasworthy* v. *Strutt*, 1 Ex., 665; *Atkyns* v. *Kinnier*, 4 Exch., 776, and *Bettes* v. *Burch*, 4 Hurl. and Nor., 566. The

Loans of money.

685. The contract next to be considered is that of loan, or borrowing for consumption, whether of money, or other thing answering the description. It differs from loan for *use* (which is a bailment), in that the property of the money, or other thing lent for consumption vests in the borrower, (not returned, but) re-placed by him, with an equivalent;—together with such compensation for the loan, as may have been stipulated.[a]

Interest.

686. The compensation for the loan of money is *interest;* and for performance of the terms of the contract on the part of the borrower, it is usual to take *security*, consisting in *pledges*, or *sureties*, or both.[b]

687. The rule of Hindu law as to interest is that, no greater arrear of interest can be recovered at any one time than what will amount to the principal sum; but if the principal remain outstanding, and the interest be paid in smaller sums than the amount of the principal money, there is no limit to the amount of interest which may be thus received from time to time.[c] Interest however now may be

equity cases relieving against penalties are *Sloman* v. *Walter* and *Peachey* v. *Duke of Somerset*, 2 Leading Cases, Equity, 895, 2nd ed., *cum notis*. Where a party engages for the performance of an agreement under a certain penalty, he cannot relieve himself from the performance by offering to pay the penalty. Equity will still enforce the agreement. Ibid.

a 1 Strange's Hindu Law, 296.
Manu, VIII, 151.

b 1 Strange's Hindu Law, 296.

c Ibid., 299.
1 Madras Reports, 5; Reporter's Note, as cited in the Addenda, x.

awarded in excess of the principal. Regulation XXXIV of 1802, relating to this subject, has been repealed.[a]

688. In the absence of a demand in writing, interest up to the date of suit cannot be awarded upon sums not payable under a written instrument of which the payment has been illegally delayed. And where a party has offered to pay interest, he should be relieved from interest from the date of such offer.[b]

689. Sureties are for appearance, for the honesty of the debtor, or for payment.[c] **Sureties.**

690. In every case, the obligation of the surety becomes absolute, by the failure of the principal; the surety having paid has his claim over against his principal for re-payment.[d]

691. Between the suretyship for payment and the other two kinds, there is this difference, that in the two latter cases, the surety dying, and the principal neglecting to pay, the sons of the surety are not answerable, unless their father was himself

a 6 Madras Reports, 400.

b 1 Ibid., 369.
Ibid., 124. See Act 32 of 1839 extending to British India, 3 & 4, W. 4, c. 42, s. 28.

c 1 Strange's Hindu Law, 300. A contract of guarantee is a contract to perform the promise, or discharge the liability of a third person, in case of his default. A guarantee may be either oral or written. Contract Act, Sec. 126.

d Ibid., 301. See Contract Act, Sec. 128; 4 Indian Law Reports (Calcutta), 331.

indemnified; and then the son is liable, as he is in all cases, subject always to assets, and without interest, where the undertaking was for *payment*.[a]

692. Of sureties, jointly bound, each is answerable for his proportion only of the debt to be fixed, unless it shall have been otherwise agreed.[b]

693. Where a judgment was passed against several defendants, jointly and severally, and some of them paid the whole of the judgment-debt, it was held that they might sue the others for contribution.[c]

694. One tortfeasor, however, cannot recover contribution against another.[d]

Maintenance and champerty.

695. As to contracts relating to "maintenance" and "champerty," the law of England as to this offences does not apply to natives of India. In dealing with objections to their contracts on the ground of maintenance, or champerty, the Court must look to the general principles regarding public policy and the administration of justice upon which that law at present rests.[e]

a 1 Strange's Hindu Law, 301.

b Ibid. So also says the Contract Act, Sec. 146.

c 1 Madras Reports, 411.
As to sureties generally, see Contract Act, Chap. VIII.
3 Madras Reports, 187.

d 1 Ibid., 411, Note.

e Ibid., 153. To constitute "maintenance," improper litigation must have been stirred up with a bad motive, or purpose, contrary to public policy and justice. "champerty" is a species of maintenance and of the same character, but with the additional feature of a condition, or bargain providing for a participation in the subject-matter of the litigation.

696. The Privy Council also say that the Mofussil Courts of India, administering justice according to the broad principles of equity and good conscience, will not apply the English law of champerty and maintenance, according to the practice of the English law; but they must consider whether a transaction, impeached on the ground of maintenance is merely the acquisition of an interest in the subject of litigation *bonâ fide* entered into, or whether it is an unfair, or illegitimate transaction, got up merely for the purpose of spoil, or of litigation, and they will not allow a stranger to interfere in family affairs by an agreement between him and the real heirs, that he should be entitled to a share of the estate.[a]

697. Again they say, a fair agreement to supply funds to carry on a suit in consideration of having a share of the property, if recovered, ought not to be regarded, as being *perse* opposed to public policy. But agreements of such a kind ought to be carefully watched, and when extortionate, unconscionable, or made for improper objects, ought to be held invalid.[b]

698. In decreeing specific performance of a contract, the Court has always to consider whether it **Specific performance.**

a 1 Indian Appeals, 241.

b 4 Ibid., 23. The real tests in cases of this nature is whether the transaction was a *bonâ fide* purchase of the matter in dispute, or one for the purpose of maintaining or proceeding with the litigation and that where such is the case, Courts of law and equity will treat the transaction as an infringement of the law, against champerty and maintenance. 3 Indian Law Reports (Bombay), 402.

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can enforce the whole of the agreement, and where it cannot do so, this relief will be refused.[a]

699. Under the Specific Relief Act, (Act I of 1877) the following contracts may be specifically enforced:—

(*a.*) When the act agreed to be done is in the performance, wholly or partly, of a trust.

(*b.*) When there exists no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done.

(*c.*) When the act agreed to be done is such that pecuniary compensation for its non-performance would not afford adequate relief, or

(*d.*) When it is probable that pecuniary compensation cannot be got for the non-performance of the act agreed to be done.

Explanation.—Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer movable property can be thus relieved.[b]

a 1 Madras Reports, 341. See Specific Relief Act, (Act I of 1877), Secs. 14, 15.

b In order to obtain specific performance of a contract in equity it is essential that the contract be in writing signed by the party to be charged, &c., made between parties able and willing to contract, for a valuable consideration which must not be illegal or immoral; the terms clear and definite and a contract for the breach whereof damages would not compensate. *Cuddee* v.

700. Contracts which cannot be specifically enforced:—

(*a.*) A contract for the non-performance of which compensation in money is an adequate relief.

(*b.*) A contract which runs into such minute or numerous details, or which is so dependent on the personal qualifications, or relation of the parties, or otherwise from its nature is such that, the Court cannot enforce specific performance of its material terms.

(*c.*) A contract, the terms of which the Court cannot find with reasonable certainty.

(*d.*) A contract which is in its nature revocable.

(*e.*) A contract made by trustees, either in excess of their powers, or in breach of their trust.

(*f.*) A contract made by, or on behalf of a corporation or public company created for special purposes, or by the promoters of such company, which is in excess of its powers.

Rutter, 1 Leading Cases Equity, 640, 2nd ed.; *Seton* v. *Slade*, 2 ib. notes. A parol agreement will be enforced in equity; 1, where the agreement is set out in the bill and is admitted by the answer of the defendant, and he does not set up the statute of frauds as a bar; 2, where it has been prevented from being reduced into writing by the fraud of the defendant; 3, where there has been a part performance. *Lester* v. *Foxcroft*, 1 Leading Cases Equity, 625, 2nd ed. When any of the above requisites are wanting, equity will not enforce specific performance. The acts which will be regarded as part performance must be such as are clearly and exclusively referable to a complete agreement, and must have been done with no other view than to perform such agreement. See above case.

(*g.*) A contract, the performance of which wishes the performance of a continuous duty extending over a longer period than three years from its date.

(*h.*) A contract of which a material point of the subject-matters supposed by both parties to exist has, before it has been made, ceased to exist. As to other matters relating to specific performance of contracts, see Specific Relief Act.

701. Specific performance has been decreed of a lease, though the lease formed part of an arrangement whereby as a consideration for the lease the plaintiff was to lend the defendant money to enable him *inter alia* to commence legal proceedings against the then tenants of the subject-matter of the intended lease.[a]

702. Specific performance is a branch of the jurisdiction of the English Courts of Equity not taken from the Roman law and its application to partnerships is governed by the same rules as those which govern it in other cases.[b]

a See above decision.

b 1 Madras Reports, 341. The natural remedy for a breach of an agreement to enter into a partnership is an action for damages and there are only two classes of cases in which the specific performance of such an agreement has been decreed: 1. Where the parties have agreed to execute some formal instrument which would confer rights which would not exist unless it was executed. *England* v. *Carling*, 8 Beav., 189. 2. Where there has been an agreement which has come to an end to carry on a joint adventure, and the decree that the agreement is a valid agreement, prefaced by the declaration that the contract ought to be specifically performed is made merely as the foundation of a decree for an account. *Duke* v. *Hamilton*, 2 Phil., 266. See also Fry on Specific Performance of Contracts; Lindley on Partnership, 947, 948, 2nd ed. So also on the same principle the Court

703. As to Bills of Exchange, Promissory Notes, &c., Chapter 39 of the new Civil Procedure Code (Act X of 1877) provides a summary remedy for their enforcement.

CHAPTER XIII.

MALABAR LAW.

Basis of Malabar law.

704. In Malabar and Canara, concubinage is the rule, and the whole law of inheritance is based upon the existence of heritable blood between the mother and son, quite irrespectively of the father. There is there no *agnation* at all.[a]

Marumakkatayam and Aliya Santana.

705. This system of law is termed *Marumakkatayam* in Malabar, and *Aliya Santana* in Canara. The latter differs from the former in more consistently carrying out the doctrine that all rights to property are derived from females.[b]

No suit can be brought for division.

706. The whole doctrine of a Malabar family is, that they are all to reside in the family-house and be there supported by the head of the family; and no suit can be brought for division. The same principle is followed in Canara. There may be a division by mutual consent. The principle of divi-

will decree specific performance of a lease under seal, although the term for which the lease was to continue has already expired. *Wilkinson* v. *Tookington*, 2 Y. and C. Exch., 726.

a 1 Madras Reports, 201.
In Malabar, sons do not inherit. The heirs are sisters, sisters' sons, sisters' daughters, sisters' daughters' sons, &c.

b 2 Madras Reports, 12.
1 Ibid., 380.
Marumakkatayam is the system of inheritance in the female line. *Aliya Santana* implies the same.

sion would be according to the *Taverais* or branches of the family, that is according to the number of sisters of the common ancestor.[a]

Origin of *Marumakkatayam*. 707. According to *Mr. Strange*, the origin of the *Marumakkatayam* Rules is attributable to *Parasooraman*, the first Raja of Malabar. He introduced *Brahmans* into the District and gave them possessions there. In order to prevent these from being split up, he decreed that they should vest in the elder brothers, whom alone he permitted to contract marriage. The sons of these were to be accounted as sons for the whole family. The junior brothers, being without wives, were allowed to consort with females of lower castes. The offspring of these unions, not being legitimate, could not rank as Brahmins, or inherit from their fathers. Their inheritance was hence made to follow from their mothers. The lower castes fell into the same system of promiscuous intercourse among themselves. The offspring succeed to the estate in the mother's family, it being obvious that parentage cannot be traced out in the line of the male.

Castes that follow *Marumakkatayam*. 708. The castes that follow *Marumakkatayam* are all except *Brahmans* and *Aka Podnals* a class of pagoda servants, the artisans, viz., carpenters, brass-smiths, blacksmiths and goldsmiths and some of the lowest denominations such as the *Cheromars* or slave tribe, the *Malayers* and the *Paniars* with whom the rule of descent is to sons. Some classes in North

a 2 Madras Reports, 12.

Malabar follow *Marumakkatayam* while those to the South observe *Makkatayam* or descent to sons. In North Malabar, most of the *Moplahs*, although *Mahomedans*, follow the former rule in this respect having conformed to Hindu usage in the times of the ascendancy of the Hindus.[a]

Meaning of term *Taverai*.

709. In Malabar the *Taverai* has several distinct meanings. In the families of the princes, all the houses have separate property, and the senior in age of all the houses succeeds to the royalty, with the property specially devoted to it. This mode of succession may be regarded as rather due to public, than to private law. Private families have sometimes adopted the same custom, but there is the strongest presumption against the truth of this in a private family—families becoming very numerous have often split into various branches. In the language of the people there is *community of purity and impurity but no community of property*. In the only sense of the word *Taverai* with which Courts of Justice are concerned, people so related are not of the same *tarwâd*. Where there are several houses bearing the same original *tarwâd* name, but with an addition, and there is no evidence of the passing of a member of one house to another, there is the strongest ground for concluding that a separation has taken place.[b]

a Strange's Manual, § 384.

b 6 Madras Reports, 411. A *tarwád* is a family or household. In a *tarwád* there may be different *taverais*: the *kárnavan* of each *taverai* is the senior male member of it, called the branch *kárnavan*, and he is under the control of the *kárnavan* of the *tarwâd*.

Law as to self-acquisition in Malabar.

710. By the law of Malabar, all acquisitions of any members of a family which he has not disposed of in his life-time, form part of the family property.[a]

711. The acquirer, however, may during his life-time, hold, alienate at once, and encumber his self-acquisition.[b]

712. The father may give whatever self-acquired property he likes, but no ancestral property, to his children. This, his private property, may be inherited by his children.[c]

In Canara.

713. In Canara, the husband is not permitted to confer even upon his wife any gifts, but the marriage present; if he give more, the family may resume it.[d]

Presumption as to self-acquisition.

714. A *kárnavan* of a *tarwâd* in possession of the family funds is presumed to have made all acquisitions with them and for the benefit of the corporate body. But such presumption is not irrebuttable, and his alienation of or charge on such acquisitions made during his lifetime may be valid.[e]

a 6 Madras Reports, 162.
b Ibid.
c *Bhútálapándiya cited* in 1 Ibid., 3380.
d Ibid., 1 Ibid., 380.
e 2 Madras Reports, 162.
A *kárnavan* is the senior member of a *tarwád*. The position of a *kárnavan* is not analogous to that of a mere trustee, or officer of a corporation, or the like. The person to whom the *kárnavan* bears the closest resemblance is the father of a Hindu family. He should not be removed from his situation except on the most cogent grounds. 1 Indian Law Reports (Madras), 153. Some of the causes for which a *kárnavan* may be removed are loss of caste, old age, madness, waste, &c. The position of *kárnavan* belongs to the eldest relative of the deceased and not to the nearest in blood.

715. By Malabar law, the *kárnavan* is the natural guardian of every member within his *tarwâd*, and a father can claim no right to the custody of his children.[a]

Duties of *kárnavan*.

716. A *kárnavan* cannot part by contract with the privileges and duties which attach to the position of *kárnavan*, so to be unable to resume them.[b]

717. An arrangement whereby the *kárnavan* of a *tarwâd* delegates the management to two branch *kárnavans* is not absolutely irrevocable by himself, or his successors.[c]

718. A *kárnavan* may be superseded for incompetency. The causes which will disqualify the *kárnavan* or loss of caste, old age, deafness, blindness, dumbness, madness, disgraceful conduct, and dissipation of the family means. When put aside, whether by the family or by force of legal means, he is to be replaced by the next senior competent male member.[d]

***Kárnavan* may be superseded.**

719. An *anandravan* of a *tarwâd* governed by the *Marumakkattayam* rule has no right to an account from the *kárnavan*. The English doctrine as to the right of a *cestui que trust*, to call for an account, has no application to a case of this sort.[e]

***Kárnavan* need not account to anandravan.**

a 7 Madras Reports, 179.
b 6 Ibid., 145.
c 6 Ibid., 401.
d 1 Strange's Manual, § 389.
e 2 Madras Reports, 12.

Right of management.

720. Each member of a *tarwâd* has a right to succeed by seniority to the management of the family property.[a]

721. The right of the eldest member of a *Nambúdiri* family to manage the *illom* is absolute; and when a junior member has in fact managed it, then this is presumed to have been with the permission of the former, who may at any time take up the actual control.[b]

In Canara.

722. Under the *Aliya Santana* system in Canara, according to *Bhútálapándiya*, "The eldest child of the eldest sister, be it male or female, is to be the *yajamána* and is to hold the property as such; but it cannot be divided among the family. The remaining members are to act under the authority of such female or male manager. If a disagreement takes place between the sisters, the elder sister is to provide the younger sister with a separate house and its necessary apparatus, retaining the general managership and the performance of ceremonies. But no division of property can be made.[c]

723. To the dignities of chief families held by the manager of the senior branch, the member of his own *santana* will, on his demise, be entitled to succeed. Those of the junior branch shall have no

a 2 Madras Reports, 12.

b Ibid., 110.
A *Nambúdiri* family is a Brahman family. An *Illom* is a house or family.

c *Bhútálapándiya* cited in; 1 Madras Reports, 380.
Yajamána is a manager.

right. If all the members of the senior branch be extinct, then those of the junior will have a right.[a]

724. Females, before puberty, go through a form of marriage, but in attaining maturity, they cohabit with whom they please of the same caste. **Marriage.**

725. There is nothing analogous to the state of widowhood as elsewhere existing. Females whether in alliance with males or not reside in their own families.[b]

726. According to Malabar law an adoption may be made in failure of the sister's children. The adoptee must be a female, but her brother may be adopted with her to manage the property and to perform the family rites. **Adoption.**

727. In Canara, too, females only are recognized as the proprietors of family property. On failure of collateral descendants, a female of the same *bulli* must be adopted. Males cannot be adopted.[c]

728. From failure of heirs, *aliya santana* estates cannot be sold nor transferred to the wife's children. The father must adopt a female who is to inherit the property.[d]

729. If a family becomes extinct without such an adoption, the elders of the caste should assemble, and

a *Bhútálapándiya* cited in ; 1 Madras Reports, 380.
Yajamána is a manager.
Santana is offspring or family.

b 1 Strange's Manual, § 400.

c 1 Madras Reports, 380, citing *Bhútálapándiya.*

d *Bhútálapándiya* above cited.

adopt another couple of people from the same lineage, whose offspring then succeeds to the property.[a]

Inalienability of *tarwâd* property.

730. It is the unquestionable law of Malabar that *tarwâd* property is inalienable except in cases of adequate family necessity. In such cases alienations will be upheld, but it lies upon the purchaser to make out with abundant clearness that the purpose was a proper one. The assent of the senior *anandravan* is some, but rebuttable, evidence that the purpose was proper. Considering the state of Hindu families, a purchaser would be affected with notice by much slighter evidence than a purchaser in other countries.[b]

Property assigned in *Náyar* family for support of females may be taken in execution.

731. Property assigned by the males of a *Náyar* family for the support of their females is still family property and liable, as such, to be taken in execution of a judgment against the *karnavan*.[c]

Sale of family property when valid.

732. According to Malabar law, a sale of family property is valid when made with the assent, express or implied, of all the members of the *tarwâd*, and when the deed of sale is signed by the *kárnavan* and the senior *anandravan*, if *sui juris*.[d]

733. Such signature is *primâ facie* evidence of the assent of the family, and the burden of proving their dissent rests on those who allege it.[e]

a *Bhútálapándiya* above cited.

b 3 Madras Reports, 294.

c 2 Ibid., 41.

d 1 Ibid., 248, 350.
An *anandravan* is one of the members of a *tarwâd*.

e 1 Madras Reports, 248.

734. The assent of the *anandravans* is necessary to a sale of *tarwâd* land by a *kárnavan*.[a]

735. The chief *anandravan's* signature to the instrument of sale is sufficient, but not indispensable, evidence of such assent.[b]

When invalid. 736. When the *úrálans* of a *dewasvam* are four *tarwâds*, a sale of the *úrálama* right by one *tarwâd* without the consent of the others, is altogether invalid.[c]

Debts. 737. Debts incurred by a *kárnavan* will be presumed to be family debts and are a charge with estate: no such presumption attaches to the debt contracted by the *anandravan*.[d]

738. The share of any member of a *tarwâd* is not liable for his debts.

Right to maintenance. 739. The right of a member of a Malabar family to maintenance is merely a right to be maintained in the family-house.[e]

When division can be made. 740. A partition of family property cannot be made except with the consent of the other members of the family. If a division were made, it would be according to the *taverais* of the family, that is the property would be divided first according to the

a 1 Madras Reports, 359.
b Ibid., 6; Ibid., 401.
c Ibid., 262.
Urálans are managers. A *dewasvam* is a temple.
d Strange's Manual, 368.
e 2 Madras Reports, 12. See also Strange's Manual, Sec. 402.

members of the sisters of the common ancestor, and afterwards among their progeny.[a]

Kánam-mortgage.

741. A *kânam-mortgage* cannot be redeemed before the lapse of twelve years from the date of its execution.[b]

Rights of *kánamdár*.

742. A *kánamdar's* right to hold for twelve years, depends on his acting conformably to usage and the *jenmi's* interest, and is lost if he repudiates the *jenmi's* title.[c]

743. A *kánam-mortgagee* does not forfeit his right to hold for twelve years from the date of the *kánam* by allowing the *purappad* fall into arrear.[d]

744. As the land cannot be reclaimed before the lapse of twelve years, it seems only consistent with justice that the money should not be reclaimable until that period has elapsed.[e]

745. Where, however, the demisor is unable to give possession, it is reasonable that the demisee

a Strange's Manual, Sec. 389.

b 1 Madras Reports, 261.

A *kánam* is a deposit of money made upon land leased out for a term of years, the deposit to bear interest which is deducted from the rent. The principal is paid on expiry of the lease which is now renewed. See also, 2 Madras Reports, 315.

c 2 Madras Reports, 109. It can make no difference that this is done for the first time by the *kánamdár* in his answer in the suit, or that on appeal he takes the point, as to non-redemption, within twelve years.

1 Ibid., 445.

A *kánamdár* is a mortgagee. A *jenmi* is a proprietor. As to *jenm* right, see 2 Strange's Hindu Law, 461, 462, Ellis.

d 1 Madras Reports, 112; 6 Ibid., 261.

Purappad is net-rent.

e 2 Madras Reports, 315.

should be allowed to repudiate the contract and recover the amount advanced.[a]

746. Where a first *kánam-holder*, denied his own *kánam* and alleged an independent *jenma* right, it was held that he had not thereby forfeited his right to rely upon the option to make a further advance to which as *kánam-holder* he was entitled, though the denial and allegation were false. It is nevertheless incumbent on the *jenmi* under the usage prevailing in respect of *kánam* mortgages to afford a prior *kánam* mortgagee of small amount an opportunity of accepting or refusing a subsequent *kánam* of a higher amount before assigning the mortgaged property to another.[b]

747. A *melkánamdár* cannot eject a *kánamdar* or his assignee before the expiration of twelve years from the date of the *kánam*.[c]

748. A *kárnavan* singly may make an *otti* mortgage.[d] Otti mortgage.

749. An *otti* differs from a *kárnam* mortgage, first, in respect of the right of pre-emption which the *otti-holder* possesses; secondly, in being for so large a sum that, practically, the *jenmi's* right is merely to receive a peppercorn rent.[e]

a 2 Madras Reports, 315.
b 1 Ibid., 13.
c Ibid., 296.
A *melkánamdár* is a second mortgagee.
d 1 Madras Reports, 122.
An *otti* is a species of mortgage.
e 1 Madras Reports, 261. An *otti* is chiefly a usufructuary mortgage.

750. An *otti*, like a *kánam* mortgage, cannot be redeemed before the lapse of twelve years from its date.[a]

751. During the continuance of a first *otti* mortgage, the *jenmi* is in the same position as regards his right to make a second *otti* mortgage to a stranger after, as he was before the lapse of twelve years from the date of the first mortgage, but he can do so only on the refusal of the first *otti* holder to make an additional advance.[b]

752. Where a *jenmi* made an *otti* mortgage and more than twelve years after made a second *otti* mortgage to a stranger without having given notice to the first mortgagees, so as to admit of the exercise of their option to advance the further sum required by the *jenmi*, it was held that the second mortgagee could not redeem the lands comprised in the first mortgage.[c]

753. An *otti* mortgagee has the option to make the further advance (if any) required by the mortgagor.[d]

754. An *otti-holder*, like a *kánamdár*, forfeits his right to hold for twelve years by denying the *jenmi's* title.[e]

a 1 Madras Reports, 122.
b Ibid., 356.
c Ibid.
d 1 Ibid., 13, note.
e 2 Ibid., 161.

755. There is a species of mortgage which occurs in Canara, termed *iladárawára* mortgage and resembles a Welsh mortgage, the mortgagee being in possession and taking the rents and profits in lieu of interest, and the security carrying a right to redeem but none to foreclose. The *iladárawára* mortgagee pays the Government revenue.[a] Iladárawára mortgage.

756. In the case of a *Peruwarthum* mortgage when the mortgagor redeems, the mortgagee is entitled before the restoration of the mortgaged land to be paid its *market value* at the time of redemption, and not the amount for which the land was mortgaged.[b] Peruwarthum mortgage.

a 1 Madras Reports, 18, note.
A Welsh mortgage (now fallen into disuse) is one in which there is no condition or proviso for re-payment at any time. The agreement is that the mortgagee to whom the estate is conveyed shall receive the rents till his debt is paid, and in such case the mortgagor and his representatives are at liberty to redeem at any time. 2 Spence, 616.

b 1 Indian Law Reports (Madras), 57.

APPENDIX A.

The Sivagungah Case—involving important questions of Hindu Inheritance.[a]

As an *addendum* to the Chapter on Inheritance, I have thought it would not be out of place to make a few observations in the form of an Appendix on the above case, decided in the *Madura* District Court, and now under appeal to the Privy Council.[b] The case involves questions of importance on the subject of Inheritance.

Sivagungah case.

The decision reported in 9 *Moore's*, 536, by the late *Lord Justice Turner*, when the succession was last disputed, is very frequently referred to, and is one of the Leading Cases on Hindu Inheritance.

Judgment in 9 *Moore*.

The history of *Sivagungah* and its litigation is briefly this:—

The Zemindary was founded in 1730 by the Nabobs of the Carnatic, having been carved out of the larger estate of *Ramnad*, in the *Madura* country, and was given to one *Sasirverna*, the first and original Zemindar. On his death, he was succeeded by his son who was killed in battle, and who died without issue male. The Zemindary was then nominally held by his widow for a short time. Anarchy and confusion, however, soon followed on the usurpation of the estate by two brothers called *Mundoos*. Shortly afterwards, in 1792 the Zemindary passed into the hands of the *East India Company* with the rest of *Southern India*. The estate was by them considered an escheat for want of heirs, and was thus held till the year 1801 when it was re-granted to the *Istimrar* Zemindar, not from any claims that he had to the property, but by the free choice and will of the Government, as stated in the Proclamation, issued by *Lord Clive* on the occasion.

History of the Zemindary and its litigation.

The *Istimrar* Zemindar thus obtained possession and died in 1829. The then Government, vested the succession in the collateral branch

a The appeal has been decided in the High Court and the decision of the Lower Court has been affirmed. Mr. *Justice Innes* however dissented from the *Chief Justice* and Mr. *Justice Muthusawmy Iyer* on the question of primogeniture and impartibility. The former held that impartibility and primogeniture as a custom of descent had not been made out. On the other points he agreed with his learned colleagues.

b News has reached Madras of the dismissal of the *Sivagungah* Appeal by the Privy Council. This decision has, therefore, settled the question of *Stridhana* for Southern India.

of the family, and enthroned the alleged undivided nephew of the deceased Zemindar upon the *gadi*. He did not, however, long live to enjoy the honor, but died in 1831, and was succeeded by his son. On his death a host of claimants came into the field, and the Zemindary was involved in the meshes of a very intricate litigation.

The *Istimrar* Zemindar had married seven wives, and at his death left three widows. A daughter by one of these wives first filed a suit in 1832, on behalf of her infant son, the elder brother of the present plaintiff. Next in 1833, the eldest widow came into Court. The former of these cases was dismissed by the Sudder in 1837, and in 1844 the latter was eventually decided on a technical ground by the Privy Council against the widow, giving her leave to sue again. She came into Court in 1845, her suit was dismissed, and pending her appeal to the Sudder, in 1850, she died. Her death seemed to give a new *impetus* to *Sivagungah* litigation. The other widows having predeceased her, several new claimants now contested the estate. The late Rani of *Sivagungah*, the daughter by the Zemindar's third wife, whose recent death has caused the present litigation, joining with two of her sisters, first applied for leave to prosecute the appeal of the deceased widow. So also did the daughter of the sixth wife, as well as the plaintiff in the very first suit in 1832, already alluded to. After a game of shuttlecock for *six* years with petitions and counterpetitions in the late *Sudr*, between the several parties, the *Sudr* decided that no one had a right to prosecute the appeal, and all were referred to regular suits. In 1856, therefore, the late Rani filed her suit in *formâ pauperis* in the *Madura* Court, and in 1857, the daughter of the sixth wife also filed hers. Both suits were dismissed by the then Civil Judge, by a mis-application of the doctrine as to judgments *in rem*, and the *Sudder* Court upheld the judgment. The cases however were appealed to the *Privy Council* and the Rani was successful. By a decree of the Council dated 1863, she was declared the *Zemindarni* of *Sivagungah*, and the suit of the other daughter was dismissed.

The ground upon which the late Rani based her claims, and which was eventually established, was, that the estate was her father's self-acquisition, and that whether her father's family was divided or not she was, after the deceased widow, the next heir to her father's self-acquisition in preference to the collaterals.

The late Rani died in 1877, leaving a son and several daughters. Though maiden at the time of her father's death, she had been twice married subsequently, and was married with issue male and female at the time of her succession.

The estate is again in litigation, and the claimant is one *Dorasingah Taver,* the younger brother of the plaintiff in the suit of 1832. He claims it as the eldest surviving grandson of the *Istimrar* Zemindar, in preference to the Rani's son, also a grandson, but junior to the plaintiff in years. In 1869 the plaintiff had sued for a declaration of his rights, but, though successful in the Indian Courts, his suit was dismissed by the Privy Council on the ground that being a contingent reversioner, the facts could not sustain a declarator.

Pleadings in present case.

The pleadings in the present case shortly are that, the late Rani as a *daughter,* took merely a life-estate from her father, the former Zemindar; that the inheritance is to be traced from the deceased Zemindar as last full owner, and that according to the Rule of Primogeniture, which it is said prevails in the Zemindary he, as eldest surviving grandson, succeeds to the estate. The case for the first defendant, the Rani's son is, that his mother obtained not a mere life-tenancy, but an absolute estate from her father, that the inheritance is to be traced from her, and was transmitted by her to her son, and that the Rule of Primogeniture does not prevail in the Zemindary. The other defendants, the three daughters of the late Rani submitted that, the estate was their mother's *Stridhana* and that it descends to them as reversioners. The fifth defendant was the lessee of the estate, but his case is of no importance in the discussion.

Judgment of the District Court.

The judgment of the District Court was in favor of the plaintiff, as the *eldest* surviving grandson of the Istimrar Zemindar, or in other words he succeeds by *primogeniture.* The other questions as to a daughter's estate and *Stridhana* were not discussed, as the previous judgment of the High Court in the case was considered conclusive on these points.

Questions involved.

The questions that are involved in this case are; first, when can the Rule of Primogeniture be said to exist as a mode of descent in an estate? secondly, what kind of an estate does a daughter take who inherits from her father? and thirdly, what kind of property constitutes a woman's *Stridhana?* These two last questions merge into each other and assume the form of the general question as to the *nature* of a woman's estate.

Primogeniture and Impartibility.

Primogeniture generally.

At the outset, it may be broadly stated that primogeniture, as a mode of descent, is quite unknown to the ordinary Hindu law. At one time, no doubt, it did prevail to a certain extent. The eldest son, if possessed of extraordinary merit, was entitled on division to the best chattel, or to the best room in the house. But the "honors of primo-

geniture" have long been abolished, as being quite uncongenial to the spirit of the law. The most perfect equality exists among sons. In the performance of funeral rites, all perform with equal efficacy, the *manes* of the dead giving no preference, either to the first born, or to the eldest son. As in Roman law, the property of the *propositus* descends to all the heirs, as a universal succession, and primogeniture, as a factor, has vanished from the Hindu *formula* of descent. But though primogeniture has disappeared, as a rule of descent, in *ordinary* Hindu law, it nevertheless prevails as an *exceptional* rule of inheritance in certain classes of estates. Generally speaking, all *impartible* estates descend to the eldest male, since, being impartible, they must of necessity pass to a sole heir, and that heir is almost *always* the eldest male of the family. This mode of descent is attached to the incident of impartibility, the impartible estate being placed by analogy on the same footing as a Sovereign Raj, which invariably descends to the eldest son. The mode of descent of an impartible estate by primogeniture is conceived to be as follows :—It will descend to the eldest son, then to his eldest son and so on *in infinitum*. On failure of male issue, the estate will vest in the next collateral male heir. If there be none, it will escheat to the lord paramount unless there be an adoption.

Origin of primogeniture in Europe.

Since descent by primogeniture is exceptional, it is only a truism to aver that it cannot be *assumed* to exist in connection with *all* impartible estates. It must be proved, in each individual case, to exist as a *custom* of descent. In all civilised countries primogeniture is recognised rather as a *custom*, than as a *right*. In *England*, where perhaps primogeniture more largely prevails than elsewhere, it may be traced in the custom of making *strict* family settlements, by which the eldest son becomes the tenant in tail of the fee. Primogeniture, as it exists in *Europe* generally is of feudal origin, and it owes its existence in its present form to the engrafting of the ideas of the later *Roman* jurisprudents upon the archaic notions which originally held families together. It is in fact a more perfect development of the normal idea of primogeniture, under the influence of a refined system of jurisprudence. In the oldest societies, whenever patriarchal power was not only *domestic*, but *political*, it invariably descended to the eldest *male*. No female was ever entrusted with such a position. Indeed, from the nature of the case she could not be. And in process of time under the gradual development of the feudal system, in Europe, the eldest male there by analogy to the patriarchaic chieftain obtained a position of power and trust with reference to the family property, until under the full development of that system, from the

position of a general manager of the family property, he became to be regarded as the absolute proprietor of the property he managed. The remains of this system are still visible in many parts of *Europe*, particularly in *England*, where it is traceable in the law of entail, as also in the general preference given to the eldest son.

Exists in India.

Traces of the same normal form of primogeniture are also to be found among the Hindus. Under it not only the eldest son but the eldest line is always preferred. If the eldest son fails, his eldest son has precedence not only over brothers, but over uncles; and if he too fails, the same rule is followed in the next generation.[a]

No Primogeniture among females in England.

From the origin of the *custom* of primogeniture, it appears that in a family in which the rule prevailed, no female could ever attain to this position of power and trust. It seems, however, to be a prevalent notion, that where the descent of an estate proceeds according to the rule of primogeniture, a female may enter in the line of heirs, and that primogeniture simply means *seniority by birth*, and is as applicable to *females*, as it is to *males*. Allusion is also sometime made to the succession of females to landed estate in England where primogeniture still prevails in support of the above notion. But there seems to be no ground for the contention. In *England*, females do not succeed by right of primogeniture. There is no primogeniture amongst them, according to the Common Law, and the only instance in which it applies to females is in the case of the succession to the Crown, because the necessity of a sole and determinate succession is as great in the one sex as the other, and this was passed by special statute.[b] According to English law, landed property vests first in males, who succeed by *right of* primogeniture: on failure of males, it vests in the females *equally*, and they share the estate between them as co-parceners. The only other case, besides the case of the Crown, in which a sole succession is permitted to females under English law, *but not by primogeniture*, is with regard to female dignities and titles of honor. As it is laid down by Littleton: If a man hold an Earldom to him and the heirs of his body and dies, leaving only daughters, the eldest shall *not of course* be Countess; but the dignity is in suspense or abeyance, till the king shall declare his pleasure; for he being the fountain of honor, may confer it on which of them he pleases; and the one so selected, and her issue will continue to bear it. If, however, such issue become extinct, the title will again become in *abeyance*, unless

a A good example of primogeniture as it prevailed in Europe is exhibited in the *Salic* law of *France*, under which no female could ever ascend the throne. See the question discussed. *Sir Henry Maine's Ancient Laws.*

b *Coke* upon *Littleton*, 165.

there be a failure of issue of all the co-parceners, except one, in which last case, the descendant of that one will be entitled to claim the title.[a] Hence, it is clear that according to the Common Law of England, generally speaking, females have no connection whatever either with *primogeniture,* or with a *sole* succession. Again, though primogeniture has taken deeper root in *England* than it has in other European countries, it has, nevertheless, been virtually abolished. The *right* exists, and so does the *custom;* but the former may be defeated by will, and the latter is not binding. Primogeniture, as it exists among the landed gentry of *England,* is only a *custom,* and not a *right,* as illustrated by the *strict* settlement. When it is intended to tie up an old family estate, so as to prevent its leaving the family, the practice is to make a *strict* settlement, that is, to limit the estate after the death of the settler to the first and other sons successively according to seniority *in tail male,* charged with an annual sum by way of jointure to the wife, if she survives her husband, and with portions for the younger sons and daughters of the marriage. Under such an arrangement, no female can enter, and this is the offspring of that archaic form of primogeniture by which, under the ancient law, political power descended to the eldest son, and which by analogy was made to apply under the feudal system to the inheritance of property.

Primogeniture in India, not a *right,* but a *custom*

This is the state of the case as to primogeniture in the Western world. In India, however, primogeniture has long ceased to be regarded as a *right.* And primogeniture, where it exists, exists only as a *custom,* and that only with reference to *impartible* estates, such as Principalities and ancient Zemindaries. In this mode of descent, the latter have been placed on the same footing as the former. Resembling the former in their *impartible* character and in their descent to a *sole* heir, generally speaking, like the former, they have descended by *custom* according to the rule of primogeniture. And naturally this would be so, for many of these ancient Zemindaries were nothing more than military fiefs attached to the larger Principalities. But, though it is almost universally the practice for impartible estates so to descend, no *assumption* to that effect can be made even in the case of the larger Principality. In each case, the strictest proof is required of the *custom—a custom* long established and invariable,—and where this *custom* is not proved, the estate will descend according to the general Hindu law of Inheritance.

Instances of primogeniture.

There are several instances in the Reports of impartible estates descending according to custom by primogeniture. The following

a *Coke* upon *Littleton,* 165, *Mr. Hargreave's* Note.

are some of them. In 5 *Moore*, p. 169, there is the case of the *Rawutpore Raj*. This case is considered a good example of descent by primogeniture according to Hindu law. Others appear in 7 *Moore*, 476; 9 *Moore*, 66; 10 *Moore*, 279; 12 *Moore*, 1, &c. Now in each and all of these cases, the *custom* of descent was alleged, and *proved* to have existed for many generations. The estates in these cases were all Ancient Rajs, that in 7 *Moore*, 476, being the well-known case of the *Tanjore Raj* of this Presidency which was escheated for want of male heirs, when *Sir Charles Trevelyan* was Governor of *Madras*. And in each one of these cases, there is no single instance of a female entering into the line of heirs. *Sir Charles Trevelyan's* Minute in the case of the *Tanjore Raj*, is as follows :—

(*Extract from Minute.*)

Sir Charles Trevelyan's Minute in the Tanjore case.

Para. 4.—The *Rajah* had died leaving no legitimate or adopted son. The only claimant is his senior surviving widow. My first twelve years of public service were passed in the Indian Diplomatic department, and I have as extensive a knowledge of the customs and practice of Native Chiefs as most people. I mention this as my justification for offering a confident opinion, that *the succession of females, forms no part of the constitution of Native States or Chiefships.* It may occasionally have taken place, as in the instance of *Holkar's* widow, *Ashalaya Bhai*, and the *Begum Sumroo*, but the special nature of the circumstances in those cases shows that it was a deviation from an established rule. No well-informed and impartial native would maintain the right of succession of a female to a Hindu *Raj*.

Para. 5.—I therefore consider that whether regard be had to the customs of the country, or to the public good; this is a true escheat. The so-called *Tanjore Raj* has lapsed to the Government of India. That Government stands in the place of the late *Rajah*. While we are bound to fulfil his just obligations, it is our duty to secure, on behalf of the public, everything belonging to the *Raj* not required for that purpose.

Primogeniture not a special custom.

It is alleged, however, that the cases above cited are examples of a *special* custom of descent and do not apply to the present case. But it is submitted that these are examples of descent by *primogeniture*, and the succession to the *Sivagungah* estate has been determined by the Rule of Primogeniture. Is the rule to be different in one case from one it is in another? The rule of descent is spoken of in the above cases as the *custom of the country*, that is the general custom. Is there a *special*, as well as a *general* custom of descent by primogeniture? Examples, however, of what may be properly called a

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special custom of descent in these estates also occur in the books. The case of the *Tirhoot Raj*, (6 *Moore*, 164) where the reigning Raja always abdicated shortly before his death in favor of his eldest son is such a case. So is the use of the *Tipperah Raj*, (12 *Moore*, 542). Here a *Jobraj* (*juvenis rex*) and a *Burrah Thakore* were always appointed in the lifetime of the reigning Raja, on whose death the former ascended the *gadi*, and the latter became *Jobraj*. But, even in these cases, no female is allowed to ascend the throne. From these facts it may be inferred that, in India, where an estate descends according to the Rule of Primogeniture, no female can enter the line of heirs, and where she does, the estate does not descend by primogeniture, but by the general Hindu law of Inheritance.

Three kinds of impartible estates.

From the books, too, it would appear that there are three kinds of impartible estates. There is first, the real Ancient Raj or Principality proper; secondly, the estate in *the nature* of an Ancient Raj; and thirdly, the estate which is impartible by *consent*. This last kind of estate is, strictly speaking, not impartible since it becomes divisible at the option of the co-parceners. It is only with the two first, however, that we have to do. The rule of descent in the first class of estates is *almost* invariably by primogeniture; and in the second, it is generally so, but not universally. And it is submitted that the Zemindary *of Sivagungah* (9 *Moore*, 536) is an example of the second class, and that it is a case of an impartible estate descending according to the general Hindu law of Inheritance, and not by primogeniture.

***Sivagungah* not an ancient Zemindary.**

The history of this Zemindary has already been recited, and from it, it clearly appears in the first place that it is not an *ancient* Zemindary, and that no rule of descent prevails in it except that it has always descended to a *sole* heir. As to its antiquity, it was originally created in 1730, under the Carnatic Sovereignty, it is true, but it became an escheat to the East India Company in 1792 for want of heirs. It had, in fact, lost its individuality, and its very existence as a Zemindary. In 1801 it was re-granted by Lord Clive to the first Istimrar Zemindar who had no claim whatever to the estate, and a new sunnud was granted to him. The terms of the Proclamation declare the hereditary right to the succession to be extinct, and that the Zemindary of *Sivagungah*, upon the principles on which it was erected into a Zemindary, had positively escheated to the State from which it derived protection; from this declaration, *a new order of things has sprung up;* all claims to succession were set aside and it was *optional* with the Government to select or not, as they thought

proper, any person for the Zemindary. The *new* creation of the estate as a Zemindary has also been alluded to, at least twice, by the *Privy Council* in their judgments. In 12 *Moore*, 1, a contrast is drawn by them between the state of facts existing in connection with the *Hunsapore Raj* in Northern India, and that connected with the *Sivagungah* Zemindary. The former was declared by them to be an *old* estate, in opposition to the latter which was not. They have likewise done so in their judgment reported in 13 *Moore*, 333. In this latter judgment, the *Sivagungah* Zemindary is expressly called a *new* estate. So far, therefore, as the antiquity of the *Sivagungah* Zemindary is concerned, it is plain that it is not an ancient estate, and there is therefore no presumption which perhaps might arise in the case of an *Ancient* Zemindary, that it descended by the Rule of Primogeniture. As to the descent itself no *custom* of descent is alluded to in the plaint, but a *rule* is spoken of which is about the same thing. In the previous plaint in the declaration case, a *custom* is expressly mentioned. In the present suit no evidence was given to prove a custom. On the other hand, from the admitted facts, it was quite clear there was no custom of descent by primogeniture either before the creation of the patent in 1801, or ever after. Afterwards there could not possibly have been a rule established, for the Estate was involved in litigation almost immediately on the death of the Zemindar in 1829. After his death, the Estate was seized by usurpers who were declared to have had no right whatever to it, and the Zemindary was given to the late Rani, on the ground that it was her father's self-acquisition and she became the second Zemindar of *Sivagungah*. It is difficult, therefore, to see upon what ground the Rule of Primogeniture was made to apply. And the application of the Rule appears the more extraordinary, when it is considered that the rival claimants are grandsons by different mothers. It seems to have been assumed that the *right* of primogeniture prevails under Hindu law, just as it does under English law, and that the eldest grandson succeeds in the same way as an eldest son would succeed to the landed estate of an intestate Englishman. But, for the reasons above submitted, it would appear that this is a misapplication of the Rule, so far at least, as it concerns this country.

Zemindary partible.

It was suggested, as a difficulty, that if this was not the correct interpretation of the Rule the Estate being impartible, and descending to a class of heirs under Hindu law, how was it to go, if it did not go to the eldest of that class? In the first place, it is submitted that, when an impartible estate does not descend by primogeniture, or by

any special custom, it is liable under certain circumstances to lose its impartible character, and to become partible. The facts connected with the present succession to the *Sivagungah* Estate, would constitute such a set of circumstances. The Estate could be divided, supposing no other questions were involved between the rival grandsons. According to Hindu law, a king might divide his kingdom between his sons, just in the same way as he might, and always does give it to his eldest son. If an impartible estate might escheat altogether, and vest in a stranger, on failure of male heirs, what possible objection can there be to a division if circumstances demanding it should arise? There are examples of even ancient estates having been divided, and the *Sivagungah* Zemindary therefore, which is by no means an ancient Zemindary, might be divided between the rival claimants, that is, of course, if there were not other grounds upon which the Rani's son might claim the estate in its entirety.

English rule of primogeniture has been applied to *Sivagungah*.

The fact is, in applying the rule of Primogeniture as it has been applied, the English law of real property has been tacitly resorted to. The right of Primogeniture has been assumed to exist under Hindu law, as it does under English law. The *Istimrar* Zemindar is regarded as the last full owner (or as *Benjamin Brown*, the purchaser), the Rani as tenant for life, and the heir is looked for in the same way as any English Conveyancer would search for the next heir to the landed estate of an intestate Englishman. It is not difficult to see how this has happened. Cases of Hindu law are conducted by English lawyers, and they have insensibly allowed their ideas of Hindu law to run into English grooves. English terms of real property law abound in the Indian Reports. One perpetually stumbles upon such expressions as *estates for life—estates in remainder, vested inheritances,* and *full owners* in reported cases. We have unconsciously imported the principles of our own law into our discussions of Hindu law. It is the tendency of the English mind to make everything English with which it comes in contact. We apply English principles to Hindu mortgages, we have supplanted the Hindu law of Contracts by the Indian Contract Act; and Hindu wills are interpreted according to English rules of construction. We are extending the reform in every direction. The only things we have not touched are Adoption, Marriage, and the *status* of Hindu women—the two former from the nature of the case we are compelled to leave alone, and the last we refrain from improving from a fashion we have of pandering to native prejudices and opinions.

In the present case, the English law of real property has been applied to the *Sivagungah* Zemindary. The Zemindar has been placed in the position of an intestate Englishman, and the Estate has been made to descend according to the *right,* instead of according to the *custom* of primogeniture. The *right* of primogeniture does not exist in India, and the *custom* in this particular case has not been proved. The Estate has, therefore, been illegally decreed to the plaintiff.

Nature of daughter's estate.

As to the next question, namely, the nature of the estate taken by a *daughter* inheriting from her *father,* and which merges into the more general question as to the kind of property which constitutes *Stridhana,* or woman's property, the following observations are submitted :—

The Zemindary descended to the Rani from her father, and in so devolving it either still retained its character as *ancestral* estate, or in the devolution, it became the *Stridhana* of the late Rani. If it was the former, it would descend to her son, if there was no other claimant, if the latter, it would pass to her daughters, as her next heirs. The question of *Stridhana* will be presently discussed, but we have now to see, supposing the property to be ancestral, whether the late Rani took an *absolute* estate according to Hindu law, so as to enable her to transmit the same to her son, the first defendant, in preference to the plaintiff, and thus to over-ride the right of primogeniture if that right exists. Or, in other words, are the rights of the plaintiff and the first defendant so evenly balanced that, the right of primogeniture can be made to apply, and turn the scale in favour of the plaintiff? If they were both grandsons by the same mother, their rights would be *primâ facie* equal, and, if the right of primogeniture existed, there would be no doubt that the plaintiff would be entitled to succeed. But they are grandsons by different mothers, and the Zemindary having never vested in the plaintiff's mother, from whom alone he could derive his title, the *status* of the rival claimants is not the same, and the right of primogeniture cannot apply.

This involves the question of the rights of the daughter's son. The statement that the title of the plaintiff should be traced from his *mother,* and not from his grandfather, is no doubt controverted, but the following observations on the subject are submitted.

Before however considering the rights of the daughter's son, let us discuss the nature of the estate taken by a daughter, inheriting from her father. Supposing the property in its descent to her still to retain its ancestral character, and not to become *Stridhana,*

does she, when she inherits, take a limited estate, like the widow, or does she take an estate, as absolute as that taken by a son under Hindu law? In reply it may be stated that, supposing the property not to become *Stridhana* in its descent, a daughter inheriting from her father takes an estate similar to that of a son, and that she transmits the same by representation to *her* son, just as the son's estate is transmitted by him to *his* son.

There appears to be sufficient authority to support this proposition. *Vrihaspati* says: "As a son, so does the daughter of a man proceed from his several limbs. How then should any other person take her father's wealth?" Again *Devala* says: "To an unmarried daughter a nuptial portion must be given out of the estate of the father; and his own daughter lawfully begotten shall take like a son, the estate of him who leaves no male issue." So *Nareda*: "If there be no son, the daughter is *heiress* by parity of reason: for she keeps up the progeny, since a son and a daughter both continue the race of their fathers." So *Manu*: "The son of a man is even as himself, and the daughter is equal to the son: how then can any other inherit his property but his daughter, who is, as it were, himself?" And *Misra* in his commentary on these texts says: "It should not be argued that all this relates to the daughter who has been appointed to raise up issue for her father, and that the term "not appointed" in the text of *Vrihaspati* relates to her who is selected by an implied intention without a formal declaration." It is ordained by *Manu* that if a son exist, such a daughter shall have an equal share with him. Upon this *Jagannatha* remarks, "Consequently, a daughter, though not appointed to raise up issue to her father, shall inherit, as appears from the terms 'him who left no male issue.' Are not those terms employed to show that she takes the whole estate of him who leaves no son born in lawful wedlock; for the texts relating to the succession of a daughter, and of her son are delivered by *Manu* among precepts relative to an appointed daughter? Since he has propounded no separate law concerning the claim of a daughter, these texts must be taken as intending by implication the succession of daughters *in general*. It should not be objected that their right of inheritance is not ordained by codes of law. The text of *Yâjñavalkya* expressing 'this rule concerning the heritage of him who has gone to heaven leaving no male issue extends to all classes,' declares the succession of a daughter to the estate of him who leaves no son, begotten or adopted, neither one born in lawful wedlock, nor an appointed daughter or the like; and the text of *Vishnu* conveys the same implied sense. According to the opinion of those who contend

that the son of the appointed daughter becomes the adoptive son of her father, there is no difference whatever between an appointed daughter and any other female offspring. As the producer also of a son who presents the funeral cake with equal efficacy with the son's son, she has a title to the inheritance, although the *Mitâxarâ* controverts this idea and urges that she takes in her own right and without reference to her son." From all the texts it is apparent therefore, that she is placed by the sages on the same footing as a son. She obtains ownership in the property, like the son, by *birth*. Against this array of texts of the ancient lawyers is placed a passage in the *Dâya-bhâga,* Chap. II, Sec. 2, para. 30, to the effect that "since it had been shown that, on the decease of the widow in whom the succession had vested, the legal heirs of the former owner, who would regularly inherit his property, if there were no widow, in whom the succession vested, namely, the daughters and the rest, succeed to the wealth; therefore the same rule (concerning the succession of the former possessor's next heirs) is inferred *à fortiori,* in the case of the daughter and grandson, whose pretensions are *inferior* to the wife's." This text, *Jagannatha* admits, is *not* supported by any legislator, or commentators, but it appears, he says; to have met with the approval of many lawyers—a very vague and ambiguous statement, for nothing further is said as to who these lawyers are, or where their approval is to be found. On the strength of this isolated and dubious text in the *Dâya-bhâga,* the exponent of the Bengal School, the rights of the daughters, so highly respected by Hindu sages, have been annihilated. Further, this text has been made applicable to the case of daughters in Southern India as well, and it appears to have received the sanction of the very highest Court of Appeal, (see 2, Indian Appeals, 113). The arbitrary statement at the close of the text, as to the inferiority of the daughter's position to that of the widows is nowhere supported by a single *çloka*. It seems to be an assumption of *Jimuta Vahana's,* quite in accordance with his Mahomedan notions of women's rights. *Mr. Norton,* in his *Leading Cases,* Vol. II, has shown that this inferiority is imaginary, and is based on the fact that the daughter stands *next* in the order of heirs after the widow, there being no son. It is submitted, therefore, that there is ample authority for the position that, the daughter takes as a son, and that therefore, like the son, she is capable of transmitting the estate to *her* son, who like her presents with efficacy the funeral cake. The analogy drawn by Hindu lawyers between the daughter and the son is very striking. And

it is only by a strained commentary on these texts, that their meaning has been distorted into something diametrically opposite, in order to suit the particular views of the commentator's school.

Daughter's son. With regard to the daughter's son also, his position is defined with equal clearness by the sages. *Manu* says in the well known texts: "By that male child whom a daughter, whether formally appointed or not, shall produce for a husband of an equal class, the maternal grandfather becomes the grandsire of a son's son: let that son give the funeral oblation and possess the inheritance." So also *Vishnu*: "If a man leave neither son, nor son's son (nor wife, nor female issue), the daughter's son shall take his wealth. For in regard to the obsequies of ancestor's, daughter's sons are considered as son's sons. And as son's sons inherit by right of *representation*, so also do daughters' sons inherit from their mothers by the same right. The proposition, therefore, that is contended for, is, that daughters' sons take *per stirpes* and not *per capita*, and that the only case in which daughters' sons take *per capita*, is when their mothers have *pre-deceased* their grandfather. There are authorities of weight on each side of the question. Among the writers who support the former doctrine are *Sir Thomas Strange*, *Mr. Justice Strange*, and *Messrs. West* and *Buhler*. The principal authority on the other side is *Sir W. H. Macnaghten*, a Bengal writer. And he maintains this view apparently from the alleged fact that *Jagannatha*, whom *Sir Thomas Strange* cites in support of the former, really maintains the latter view. Now it is only due to the memory of *Sir Thomas Strange* to say that, he is a singularly accurate author, and, up to the present time, no one, except *Sir W. H. Macnaghten*, (and, very recently, *Çamachurn Sircar* of Bengal) have ever found any errors in his work. It is curious, therefore, that in this particular instance *Sir Thomas Strange* should be at fault. The passage in question occurs in *Colebrooke's Digest*, vol. 2, 549, 3rd edition, in the commentary to *Sloka* CCCCXXII of *Vrihaspati*: "On failure of them (sons of daughters) uterine brothers and sons of brothers, kinsmen bearing the same family name, pupils, and learned priests are entitled to possess the estate." It runs thus: "Again if daughter's sons be numerous, a distribution must be made. In that case, if there be two sons of one daughter, and three of another, five equal shares must be allotted: they shall not first divide the estate into two parts and afterwards allot one share to each son; *for such a mode of distribution is only ordained in partition among the sons of sons, and the reasoning is not equal for a son's son, whose own father is dead, receives a share from his uncle; but the daughter's son whose*

mother is deceased, does not receive a share from his mother's sister." Now, it is submitted that, this applies to the sole case, where the daughters (the sons' mothers) have pre-deceased their father, that is, the sons's grandfather. This follows from the context, and the commentary itself. The preceding *Çloka* CCCCXXI thus: VISHNU.—"On failure of sons, and of their male issue, *the sons of daughters* shall obtain the property, for the male offspring of a son and of a daughter are equally qualified to perform obsequies for men of all classes." The *Çloka* previous to this relates to the inheritance of daughters, and is as follows; DEVALA.—"To unmarried daughters, a nuptial portion must be given out of the estate of the father: and his own daughter lawfully begotten shall take, *like a son*, the estate of him who leaves no male issue." This shows that *Jagannatha* was discussing the right of daughter's sons to succeed sons in the *absence* of daughters, at the time of the devolution of the ancestral estate, as for instance, where the latter had all pre-deceased their father. This appears also from the commentary on p. 548, on *Çloka* CCCCXXII, where he says: "Consequently on *failure* of the givers of a principal funeral cake, namely, the son, the son's son, and the son of such a grandson, *the daughter's son*, who gives a secondary funeral cake in the double set of oblations is heir; that is propounded as confirmed by the reason of the law." Again, from the portion in italics of the commentary under discussion, this is further evident. For a comparison is drawn by *Jagannatha* between a partition among son's sons and daughter's sons. And he says that there is a slight difference between the position of son's sons and that of daughter's sons. He urges that so thoroughly does the right of representation exist among sons and son's sons, that when the sons die even before the vesting of the inheritance, the son's sons stand in their places, and obtain their shares from their uncles on partition; therefore they take *per stirpes* and not *per capita*. But this right of representation he argues does not exist *to that extent* among daughters and their sons, unless the inheritance has actually vested in the daughters. But, if the inheritance has vested in the daughters, then the son represents his mother, and inherits her share in preference to her sister. It is the inference that fairly follows from *Jagannatha's* commentary, and it seems that *Sir Thomas Strange* was right in citing the commentary in support of this doctrine that daughter's sons ordinarily take *per stirpes*, and not *per capita*. This view is further strengthened by *Jagannatha's* previous commentary on *Çloka* CCCCXX, p. 547, already cited, to the effect that "if the daughters be numerous, a distribution is made. Such is their succession," which should be read with the commentary under discussion. For if the daughters having

inherited, can divide, surely the sons of each will succeed to the share of their mother's estate, that is, they will inherit *per stirpes* and not *per capita.* Such a proposition seems only to be in consonance with reason and principle. And, doubtless, *Sir Thomas Strange* had not only the particular commentary in dispute in view, but the commentary on the preceding *Çlokas* as well, when he made the statement that daughters' sons ordinarily succeed *per stirpes* and not *per capita.* It is submitted that this doctrine seems correct, supported as it is by *Mr. Justice Strange* and *Messrs. West* and *Buhler.*[a]

Right of daughters to divide.

The right of daughters to divide and create estates of severalty, however, may be and is disputed. But it is difficult though to see how it can be, when *Jagannatha* the great commentator of the *Bengal* School admits it—the school that is generally so much opposed to the freedom of women. The *Vyavahara Mayukha* (*Stokes*' edition, p. 86) also maintains the same, and the *Mayukha* is more or less an interpretation of the *Mitâxarâ.* In the *Mitâxarâ* there is nothing at all said about it, but it is a proposition that is almost self-evident. For if daughters by analogy are placed on the footing of sons, and sons unquestionably can divide, so can daughters; otherwise what would become of the analogy?

Survivorship prevailing over son's right questioned.

With regard to the sisters of daughters taking before the sons of the latter, when the estate has vested in them, there do not appear to be many decisions.[b] The Privy Council in a judgment (2 Indian Appeals, 113,) which will presently be noticed, allude to but one Bengal case on the subject. That was the case of *Boidyanath Sett* v. *Durga Churn Barak.* This case, however, does not show whether the daughter, whose estate passed to her surviving childless sister, had or had not sons. It would appear she had none. If so, the case is no authority at all upon the question. It is admitted, however, on all hands, that there is one case in Bengal, in which survivorship does not exist among daughters, but that the inheritance goes to the *son* instead. That is the case in which a daughter, who is unmarried at the time she succeeds to the inheritance, afterwards marries and has a son, the son succeeds in preference to his mother's sister. This is said to be an *exception,* and an exception which proves the general rule alleged to be otherwise.[c] It is submitted, however, that this is

a *Sir Thomas Strange* repeats the same doctrine again at p. 145. It is curious he should have made the blunder *twice.*

b See 6 Madras Reports, 310, judgment in the declaration suit (*Sivagungah* case): also 3 Ibid., 317.

c With reference to this, Mr. Mayne remarks: "This exception rests on the authority of *Çri Krishna Taikalankara* alone. In the corresponding passage

not an exception, but is rather an *illustration* of the rule that daughter's sons take *per stirpes*, and not *per capita*. In the first place there seems to be no direct authority for the position that daughters' sons ordinarily take *per capita*, except the disputed commentary of *Jagannatha*, said to be misquoted by *Sir Thomas Strange*. *Mr. Justice Strange*, too, in noticing the various points of difference between the *Mitâxarâ* and the *Dâya-bhâga*, does not mention that in Bengal daughters' sons take *per capita*, and not *per stirpes*. Indeed, on the other hand, some Bengal text writers lay it down absolutely that daughters' sons succeed, *jure representationis*, to the inheritance of their mothers, in preference to their mother's sisters.

The exception above referred to is supported, it is said, by a passage in the *Dayakrama Sangraha*, Sec. 3, para. 3. Para. 2 says that the unmarried daughter is first entitled to the succession. *Pareçwara* declares: "Let a maiden daughter take the heritage of one, who dies leaving no male issue; or if there be no such daughter, a married one shall inherit." Then para. 3 says: The following *special* rule must be here observed, namely, that, if a *maiden* daughter in whom the succession *had once vested*, and who was *subsequently married*, should die without having borne issue, the married sister, who has, and the sister who is likely to have male issue, inherit together the estate which had so vested in her. It does not become the property of her husband, or others, *for their right is exclusively to a woman's separate property* (*Stridhana.*) But if she bear a son, then, according to the analogy of the appointed daughter, as laid down by *Jagannatha*, though that son die, the estates passes to her *husband*, and not to her sisters. That is to say, the birth of a son prevents the property passing to her sisters after her death, and even if that son should die, instead of the property going to her sisters, it goes to her husband, as if it were her *Stridhana*. There does not appear to be any authority stating in direct terms that the property will pass to her son, and not to the sisters, according to the ordinary rule, but that is the inference drawn, and from this inference

of the *Dâya-bhâga* the case of the maiden daughter is made no exception to the general rule, that on the death of any daughter, the estate which now has become the property of those persons, a married daughter, or others who would regularly succeed if she had never existed. There seems no reason for the alleged rule and its soundness is doubted with much apparent justice by *Çamachurn Sircar*."—Mayne's Hindu Law, 502, 2nd ed. The commentary of *Çri Krishna Taikalankara* is further said to be an interpolation but upon what grounds does not appear. The soundness of *Çamachurn Sircar's* views have been questioned.

it is argued that this is an exception to the ordinary rule, and that the ordinary rule is otherwise. The basis, therefore, for this forming an exception and not an illustration of the rule, as contended for, is exceedingly slender. It is submitted that the object of the special, or rule of importance in the mind of the writer was, to show that such property does not descend as *Stridhana*, that is to say, that it does not constitute woman's peculiar property. The independence of women is the *bête noir* of the Bengal School, and the author fearing that this property might be considered *Stridhana* is anxious to show that it is not. The reason is not far to seek. For the woman receives the property *from her father in his house before her marriage, and when she marries it passes with her to her husband.* There would be a likelihood therefore that such property would be regarded as her *Stridhana*, and pass on her death without issue to her husband as heir. To prevent this misapprehension seems to have been the desire of the writer, and hence the *special* rule to which he draws attention. He does not say that the property would pass to her *son* if he lived, which he would have done, if he wanted to show that such a descent formed an exception to the ordinary rule of descent of property from a daughter. He only takes care to say that it does not pass as *Stridhana* to the *husband*. There is a precisely similar provision with regard to the *widow* in the same author. *Dayakrama Sangraha*, Chap. I, Sec. 2, para. 1, says: In default of the grandson and great-grandson, the widow succeeds to the estate, in conformity with the next of *Yâjñavalkya*. The wife and the daughters, also both parents, brothers likewise, and their sons, gentiles, cognates, a pupil, and a fellow student. On failure of the first among these, the next in order is indeed heir to the estate of one, who departed for heaven, leaving no male issue. This rule extends to all classes.

Para. 2.—*Here however a particular rule is to be observed, viz.:*

Para. 3.—The wife is only to *enjoy* the estate of her deceased husband. She must not make a gift, mortgage, or sale of it. So *Katyayana* declares let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the *heirs* take it. Here also the desire exhibits itself to limit the woman's estate, which is the peculiar feature of the writings of the Bengal School.

Further it does at least seem curious that the Bengal School should in the case of the descent of property be so partial to *survivorship* as represented. The Bengal law rather favours the doctrine of *repre-*

sentation than that of *survivorship*. In this respect it goes further than the law in Madras. For it permits a widow in an undivided family to inherit the estate of her husband, dying without male issue, in preference to the male co-parceners. Here the widow's right of inheritance is made to override that of *survivorship* among males. It is anomalous therefore, that, it should tolerate it among daughters, when such daughters have sons, whose claim to their mother's property it quite as strong, in fact stronger than that of a widow to her husband's. Again, in Bengal the daughter is of less account than her son. She confers less spiritual benefits than he does. She succeeds *because* she produces a son, who confers spiritual benefits superior to hers, and equal to those of a son's son. Yet, according to the popular theory although that son is born, her property does not descend to him, but to his mother's sister, who is considerably inferior to him. This rather conflicts with the idea which pervades the whole Bengal law of inheritance, that it is the efficacy of the funeral cake which decides the right to inherit. It is curious too that all the authorities cited in connection with the rights of the daughter's son are from Bengal, that is, with regard to the supersession of his rights in favour of his mother's sisters. There is nothing in the *Mitâxarâ*, that favours the doctrine. In Chap. II, Sec. 2, para. 6, occurs this passage: "By the import of the particle "also" (Sec. 7, para. 2) the daughter's son succeeds to the estate *on failure of daughters.*" Thus *Vishnu* says: "If a man leave neither son, nor son's son nor (wife nor female) issue, the son (daughter's son) shall take his wealth. For in regard to the obsequies of ancestors, daughters' sons are considered as son's sons." *Manu* likewise declares, "By that male child whom a daughter, whether formally appointed or not, shall produce from a husband of an equal class, the maternal grandfather becomes the grandsire of son's son: let that son give the funeral oblation and possess the inheritance." The Bengal authorities are the *Dâya-bhâga*, Chap. XI, Sec. 2, and the *Dayakrama Sangraha*, Sec. 4, paras. 23 to 25 of the former are as follows:—"But *Govinda Raja*, in his commentary on *Manu*, states the claim of the daughter's son, as preferable to that of the married daughter on the grounds of the following passage of *Vishnu:* "If one die leaving neither son, nor grandson, the daughter's son shall inherit the estate, by consent of all, the son's son, and the daughter's son are alike in respect of the celebration of obsequies."

Para. 24.—"This does not appear to us satisfactory, for it contradicts the text above cited, (para. 8.)"

Para. 25.—"But *in default* of a married daughter, such as above

described, the succession assuredly devolves on the daughter's son notwithstanding the existence of the father and other kinsmen."

The *Dayakrama Sangraha*, Sec. 4, is to the same effect. Para. 1, says: "*In default of all daughters* (who are entitled to succeed) the daughter's son takes the inheritance, according to the text. Let the daughter's son take the whole estate of his own father who leaves no (other) son, and let him offer two funeral oblations—one to his own father, the other to his maternal grandfather, and other texts of alike import: "Of his own father" here means his mother's father. Seeing "no (other) sons" is here used indefinitely *to signify a failure of heirs* including the daughter, otherwise it would contradict the text of *Yâjñavalkya*.

"The text of *Yâjñavalkya* is in Sec. 2, para. 1, namely, the wife and the daughters also with parents, brothers, likewise other sons, gentiles, cognates, a pupil and a fellow student. *On failure of the first among these, the next in order* is indeed heir to the estate of one who departed for heaven leaving no male issue. This will extend to all classes."

Para. 2, says: "The opinion maintained by *Govinda Raja*, namely, that on failure of a son, (grandson and great-grandson) the daughter's son is entitled to the inheritance notwithstanding the existence of the daughter, is consequently refuted by the text above quoted."

Upon these texts *Sir Thomas Strange* remarks:—"Where there are sons, their right of succession is postponed to that of other daughters of the deceased, and where such sons are numerous, when they do take, they take *per stirpes* and not *per capita*."

Now it is submitted that these texts are no authority for the doctrine that survivorship subsists among daughters when they have sons, that is, that the estate goes to the sisters in preference to the daughter's sons. The texts simply give the *order* of heirs. First, the daughters unmarried or married, then on failure of them, the daughter's sons succeed. That is to say, if at the time of the death of the father, a daughter and the son of a deceased daughter happen to exist, the former would intherit before the latter; on failure of the one, the other succeeds. They are no authority for the position that the son of a daughter, in whose mother, a portion of the inheritance has vested, will, on his mother's death, have his right to his mother's share postponed, and that his mother's share will pass to his mother's sister. If this be the meaning of the authorities, then the passage above cited from *Sir Thomas Strange* would be contradictory. For the daughter's, sons could not be said to take *per stirpes* if their

mothers' shares passed to their mothers' sisters, instead of to them in the first instance. This view of the case is further confirmed by the fact that there is also an analogous case in the succession of brother's sons, who, when they take through their fathers, take *per stirpes*, but who, when the inheritance devolves upon them alone as *nephews* take *per capita* as daughters' sons do when their mothers have pre-deceased their grandfather. (*Macnaghten*, 27, *2nd edition;* see also 1 *Strange*, 145.) The proposition contended for therefore is that, if a man die leaving daughters and sons by each, the share of each daughter will vest in her sons, in preference to her sister, that is in other words that her sons take *per stirpes*, or by right of representation. And this proposition is inevitable, if it be admitted, that the daughters have the power to divide the inheritance, and this power they undoubtedly have, according to the very authorities upon which the Courts have proceeded, in deciding upon the rights of their sons.

Decided cases against this view.

There is no doubt that there is a great weight of authority against this contention, owing doubtless to the fact that *Sir W. H. Macnaghten's* statement has been taken unquestioned. Very recently there has been a decision of the Privy Council (2 *Indian Appeals*, 113) to the effect that, a daughter's son is not entitled by Hindu law to succeed as heir to his maternal grandfather's estate, so long as any daughters not disqualified, or in whom a right of inheritance has once vested, survives. And that although a daughter who is a childless widow is incompetent, according to the *Bengal* School, to take by inheritance from her father, yet where two daughters have already succeeded jointly by inheritance to their father's estate, and at the death of one of them, the survivor is a childless widow, the latter will nevertheless take by *survivorship* the whole estate. Her disqualification to inherit existing at the death of her sister, does not destroy the heritable right which has once vested, nor the right of succession by survivorship to her sister which is incident thereto. And their Lordships observe that there is a great analogy between the case of widows and that of daughters taking by inheritance, *though the pretension of daughters is inferior to that of widows.*[a]

Daughters not inferior to widows.

It does not however appear reasonable that the daughter should be placed in a position inferior to that of the widow. Doubtless the Hindu mind in determining the ground upon which they respectively inherit drew fanciful distinctions as to the causes which furnished those

[a] This case proceeds entirely upon Bengal law.

grounds. But having once determined those grounds, Hindu lawyers seem to have placed them in the same category of heirs. Under the *Mitâxarâ* at any rate no such distinction is drawn between widows and other women who are all said to acquire property in the same manner. The distinction seems to have been judicially made. The Courts, in endeavouring to determine the position of women as heirs, in regard to the theory of spiritual benefit, (vide Mr. *Justice Muthusawmy Iyer's* remarks), have ascertained that the daughter occupies a position inferior to that of the widow. The mere fact of the widow excluding the daughter in the order of succession, is no proof of inferiority. What is asserted is that, from the analogy between the daughter and the son, her rights are at any rate co-ordinate with those of the widow, in the same sense that a son's rights are co-ordinate with his father's. And being co-ordinate heirs, where both exist on the death of the husband, there being no male issue, the preference is naturally given to the mother as the *surviving* half of her husband. That the daughter's rights are co-ordinate with her mother's seems confirmed by the fact that, when the property becomes by *inheritance*, her mother's *Stridhana*, the daughter acquires in it *vested* rights just as a son possesses *vested* interests in his father's property.[a]

Survivorship not applicable to daughters.

The key to the right of the woman's inheritance, according to judicial apprehension, may be discovered in 11 *Moore's Indian Appeals*, 487, in the judgment in the case of *Bugwandeen Debia* v. *Myna Boye*. In the course of that judgment, their Lordships observe that, the estate of two widows who take their husbands' property by inheritance is one estate. The right of survivorship is so strong that the survivor takes the whole property, even to the exclusion of daughters of the deceased widow. They are, therefore, in the strictest sense co-parceners, and one widow cannot alienate any portion of the estate without the consent of the other. And this principle has been applied to daughters. But it is submitted, however, that though this condition may exist with regard to the widow, from the texts already cited as to the daughter, and from the analogy she bears to the son, it is clear that she takes as a son, *in her own right*, and not on the principle of survivorship. Survivorship is a creature of the English law, and although it has been very generally recognised, as the rule of succession among Hindu co-parceners, yet according to *Dr. Burnell*, it is a principle entirely foreign to the Hindu law. However this may be, it seems certain that it does not regulate the succession among daughters. Indeed, the application of the term co-parceners, even to widows, appears inappropriate. And it

a 5 Madras Reports, 111.

is only an illustration of the manner in which English law terms have been employed to describe Hindu estates, and Hindu persons. Now it is held that generally speaking under Hindu law, widows have not the right to divide. And yet they are declared in the strictest sense to be co-parceners. But it is an incident of co-parcenery under English law that co-parceners have the right to divide without mutual consent, that is the peculiarity of their position. How comes the term then to be applied to widows at all? Where a man leaves several widows, they are said to succeed him as joint tenants, and as one heir, with rights of survivorship. But even joint tenants may sever their estate. The application of these terms therefore to Hindu estates conveys very inaccurately the actual condition of things. And there is no doubt that the application, or rather misapplication of these terms has led to misconceptions. The term co-parceners having been applied to widows succeeding their husbands, the right of survivorship followed, and the extension of the terms to daughters became at once easy and natural. The males are co-parceners with rights of survivorship, so by analogy must be the females. Of course, as we have removed women from the position they had under the ancient law, we have been obliged to make a law of our own for them. This law seems to consist of the feudal law of real property, more or less engrafted on the Hindu law. We call widows co-parceners, but then co-parceners may divide, whereas women can never possess property as their own by inheritance, so they must not be allowed to divide lest by this process they should become owners of their individual shares. But what text of Hindu law is there prohibiting widows from dividing? The result is that the tendency of the decisions is to carry out in its integrity the text of *Manu* that "women are never fit for independence." The only question is, Does the Hindu law place daughters in the position of sons? The texts on this subject are explicit. If these texts are decided upon on their merits without any forced analogies drawn from other sources, and without the aid of dubious commentaries, the conclusion might then be arrived at that, if the daughter takes as a son then, like the son she transmits the estate to *her* son by representation, which principle will, and must, override any imaginary rule of survivorship, supposed to exist from the analogy to widows. The point is simple, and materials exist in abundance for its decision. If the view contended for be correct, the *Sivagungah* Zemindary will then descend to the first defendant, as the son of the late Rani, in preference to the plaintiff, the son of her deceased sister, and in whose mother the estate never vested.

Question of *Stridhana.*

As to the next question, whether or not the estate taken by a daughter inheriting from her father, in its devolution becomes the daughter's *Stridhana*, or peculiar property: the following observations are submitted:—

Tendency of Court decisions.

There can be no doubt that, there is a strong tendency in the Courts to circumscribe, rather than enlarge the estate possessed by a woman. One of the most important decisions on the subject is that of the *Privy Council*, reported in 11 *Moore*, 487, in which it is categorically laid down in a case that arose in Bengal under the *Benares* law, that no property movable or immovable inherited by a woman from her husband forms her *Stridhana*. She may alienate the *movable* during her life-time, but not the immovable property, and both descend to the reversioners after her death. In nearly all the cases indeed in which the estate inherited by a woman has been declared not to be her *Stridhana*, the person inheriting has been a widow. Her case has been selected as a sort of model for the decision of the others. In Bengal, of course, where a woman seems to be in a position little better than a slave, and where the greatest restrictions are placed upon her powers of alienation, it has long been held that no estate inherited by any woman forms her *Stridhana*.[a] In Bombay, the Courts are more liberal, and in their interpretation of the *Mitâxarâ*, they hold that all property *inherited* by a woman, with certain limitations as to alienation, forms her *Stridhana*. The Madras Courts, however, seem inclined to follow the Bengal School and rigidly to limit the *quantum* of a woman's estate to a mere life-tenancy.

Condition of women under ancient law superior.

The result of the limitation of their legal rights is that the social position of Hindu women in these modern times does not seem to improve; they are still kept in a comparatively abject condition. And while Hindu males have reaped largely the benefits of Western civilisation, Hindu females are kept deplorably in the background, not only with regard to education, but with regard to their rights to property, and their position generally. If *Sanskrit* scholars have not misled us, Hindu women were in a much better position in the old *Vedic* period. *Mr. Monier Williams*, writing to the *London Times*, observes:—" No one can read the *Vedic* hymns, without coming to the conclusion that, when the songs of the *Rishis* were current in Northern India, (fourteen or fifteen centuries B. C.), women enjoyed

a *Mr. Mayne* is of opinion that women are more favored in Bengal than elsewhere. This may be with reference to the fact that, that there are more females included among the heirs than there are elsewhere. But in the exercise of powers of ownership over their property, they are far more restricted than in the other Provinces.

considerable independence. Monogamy has probably the rule, though polygamy existed, and even polygamy was not unknown." In *Rig-Veda*, 1, 62, 11, it is said our hymns touch thee, O strong god, as loving wives a loving husband. The *Assus* had only one wife between them (1, 119, 5,) women were allowed to marry a second time (*Atharwa-veda*, 9, 5, 27.) Widows might marry their deceased husband's brother (*Rig-veda*, 10, 40, 2.) There were even allusions to a woman's choosing her own husband (*Swagam-vara*), which was a common practice among the daughters of *Kshatryas* in the heroic period. * * * The condition of women, as represented in the laws of *Manu*, several centuries later (perhaps about 500 B.C.) was one of less liberty. But, the contradictions in the code show that no settled social organisation unfavourable to women prevailed at that epoch. * * * As time went on, the jealousy of the opposite sex imposed various restraints, restrictions, and prohibitions. A more settled conviction as to some inherent inferiority and weakness in the constitution of women took possession of men's minds. Yet through the whole heroic period of Indian history, and up to the commencement of the Christian era, women had many rights and immunities from which they were subsequently debarred. * * * In India, mothers have always been treated with the greatest reverence. We may note, too, that something of the spirit of chivalry was displayed in the tournaments of Indian warriors who contended for the possession of the heroine of the *Swagam-vara*. Women were certainly not yet incarcerated. They were not yet shut out from the light of heaven behind the *Purdah*, or within the four walls of the *Zenana*. It is even clear from the dramas that the better classes had received some sort of education, or could, at least, read and write; and it is noteworthy that, although they spoke the provincial dialects, they understood the learned language, *Sanskrit*. They often appear unveiled in public. They were not confined to intercourse with their own families. *Sita* showed herself to the army. *Sakuntala* appeared in the Court of king *Dushyante*. *Dumayunte* travelled about by herself. The mother of *Rama* came to the hermitage of *Valmiki*. *Rama* says in reference to his wife, neither houses, nor vestments, nor enclosing walls are the screen of a woman. Her own virtue alone protects her. All those characters may be more mythical and ideal than historical, but they are true reflections of social and domestic life, in the heroic age of India."

After speaking of the gradual decline of the *status* of women, *Mr. Monier Williams* goes on to say that in the time of *Warren Hastings* an assembly of the best *Pundits* was formed in Calcutta for the purpose of drawing up an authoritative summary of Hindu law, and

he gives a specimen from this summary taken from the Chapter on Women. Here it is: "A man both night and day must keep his wife so much in subjection that she by no means be mistress of her own actions. If the wife have her own free will, she will behave amiss. A woman must never go out of the house without the consent of her husband. She must never hold converse with a strange man. She must not stand at the door. She must never look out at the window. She must not eat till she has served her husband and his guests with food. She may, however, take *physic* before they eat. It is proper for a woman after her husband's death to burn herself in the fire with his corpse." These are still Bengal ideas as to women, and it is not difficult to trace herein the effect of the Mahomedan conquest upon the Hindu mind. These notions as to women are purely of Mahomedan origin. Continuing his observations *Mr. Monier Williams* asks, "What is the present position of the women in India? and thus describes the climax. A little study of the Indian Office Statistics reveals a condition of prostration which even the most sanguine might pronounce hopelessly irremediable. One hundred millions of women supposed to be actual subjects of the British empire are, with few exceptions, sunk in absolute ignorance. They are unable to read a syallable of their mother-tongue, they are never taught the rules of life and health, the laws of God, or the most rudimentary truths of science. In fact, a feeling exists in most Hindu families that a girl, who has learnt to read and write, has committed a sin which is sure to bring down a judgment upon herself and her husband. She will probably have to atone for her crime by early widowhood. And to be a young widow, is believed to be the greatest misfortune that can possibly befal her." This is a true picture of woman's social and domestic *status*. There has been also a corresponding diminution of her legal rights as has been already alluded to. The following is what the late *Mr. Horace Hayman Wilson*, Boden Professor of *Sanskrit*, at Oxford, says in regard to her ancient rights. In Vol. V, of his Works containing a *critique* on *Sir Francis Macnaghten's* Considerations of Hindu law, speaking of the widow, p. 17, he says :—"Originally the duty of the widow was only pointed out to her, and she was left in law, as she was in reason, free agent to do what she pleased with that which was her own, but that in later times attempts of an indefinite nature have been made to limit her powers. The eagerness with which the latter doctrine is regarded by the scholiasts of the present day is ascribable in all probability to that contempt for the female sex which they have learned from their Mahomedan masters."

At page 21 he says:—"There being no law against the validity of her donation, it follows that she has absolute power over the property—at least such was the case till a new race of lawgivers, with *Jimuta Vahana* at their head, chose to alter it, but they only tampered with the law of inhertance, and the law respecting legal alienation being untouched, remains to bear testimony against their interpretation of a different branch of the law." And at page 22: "The ancient lawgivers were too wise to attempt impossibilities, they gave the widow good advice but abstained from legislating what it was impossible to enforce." And he makes many other observations to a similar effect.

The great conflict of authority at the present day in connection with the rights of women relates to the question, whether or not, property *inherited* by a woman constitutes her *Stridhana*. All are agreed, more or less, as to the different kinds of property which constitute it, as laid down in the books, except as to this one kind, namely, property *inherited*, about which they differ. The text which has given rise to the discussion occurs in the *Mitâxarâ*, Chap. XI, Sec. 2, para. 2, which after describing other kinds of woman's property, ends by saying, "and also property which she may have acquired by *inheritance*, purchase, partition, seizure, or finding, or denominated by *Manu* and the rest woman's property." Writers of the *Bengal* school ignore this text altogether, it beng by many regarded as an interpolation. But *Sanskrit* scholars affirm that it is not, but that it is simply the conclusion arrived at in accordance with the previous reasoning of the author. (See *Messrs. West* and *Buhler's Digest*, Vol. II, *Appendix*, where the whole question is elaborately discussed.)[a]

[a] The following are Dr. *Burnell's* remarks on the disputed text:

"There can be no doubt that in South India property that a woman inherits is *Stridhana*, though it has been absurdly decided that this is not the case.

"The authority is *Mitâxarâ*, Chap. II, 11, Secs. 2, 3, 4.

"2. By the word '*Adya*' and the like (in the text of *Yâjñavalkya*) property acquired by inheritance, purchase . . . . (is intended.)"

"3. And the word *Stridhana* (is used here) in its natural, not in a technical sense; for a technical sense is improper, if a natural sense be possible.

"4. But as for what *Manu* says 'what was given before the fire,' &c . . . . this sixfold nature of *Stridhana* is on purpose to exclude a less number, not to exclude a greater number, and is thus no objection to my definition."

"The commentary *Subodhini* on the *Mitâxarâ* makes this quite plain. It runs: some say—Is not the word *Stridhana* (used) in a non-natural sense like '*Acvatara*' and '*Nadi*', as six kinds are reckoned by virtue of the text of *Manu*?"

"*Acvatara* means a mule from *acva*, a horse. *Nadi* means a river, from *nad*

It has been already observed that the Bengal school whether in imitation of their Mahomedan conquerors, or from motives of expediency, or otherwise, have placed the utmost restrictions upon the power of a woman over her property. The latest decision of the Bengal High Court on the subject is by *Couch, C. J.*, reported in 14, Bengal Reports. In this, the learned Chief Justice reviews all the cases, and after dissenting from the views of the Bombay High Court, more than ever establishes the law as to *Stridhana* peculiar to Bengal. This was a case of a daughter inheriting from her father.[a] The Madras High Court in its decisions on the question has followed in the wake of the Bengal Courts and has decided the point upon Bengal authorities. The two leading cases of the Madras Courts as to *Stridhana* are, 2 Madras Reports, 402; and 3 Madras Reports, 312, (see also 8 Madras Reports, 88)—the former decided by *Messrs. Frere and Innes* the latter by *Sir Colley Scotland.* The latter seems simply to follow the former and coincides entirely with the reasons therein stated. One ground which appears to have induced the former learned Judges to follow Bengal authorities is the alleged fact that *Sir Thomas Strange* himself seems to have changed his views as to the prevalence of the doctrine of the *Mitâxarâ* as to *Stridhana* in Southern India. *Sir Thomas Strange*, it is said, omitted in his edition of 1830 the distinction between the Bengal and the Madras schools, as to the inheritance of a woman constituting *Stridhana.* He is also stated to have decided that a mother inheriting from a son would not take the property as *Stridhana* (2 Notes of Cases, 211, decided in 1813). But it is clear that the alleged omission is not an omission of the kind stated. In

sound; that is, both words are used in a technical sense contrary to their Etymology."

"That opinion is wrong for it is opposed by other texts and by the custom of the good. The author, with the notion that a natural meaning is better than a senseless technical meaning, says the word *Stridhana* is used with a natural meaning."

"The only other authorities of use in South India are the *Smṛti Çandrikâ*, *Sarasvativilasa*, *Pareçwara Mâdhavîya* and the *Vyavahara Nirṇaya*; of these the three first repeat the words of the *Mitâxarâ* that six is to exclude a less, not to exclude a greater number." "It logically follows therefore that the authors of these treatises gave *Stridhana* the natural and largest meaning."

"It is utterly impossible to limit the meaning of the word as some English Lawyers have presumed to do without understanding the original."—3 *Indian Jurist*, 56, 57.

a This case has since been affirmed by the Privy Council in which they have upheld the Bengal views of *Stridhana* in connection with daughters. See Chap. II on *Stridhana*.

the edition of 1830 at page 31, *Sir Thomas Strange* gives a list of property constituting *Stridhana* and in this list he classes as *Stridhana* property acquired by women by inheritance and the doctrine of the Southern school is alluded to in opposition to that of the Eastern or Bengal school. It is again spoken of by him at pp. 248, 249 of the same edition and is also cited by him as the opinion of *Colebrooke* (2 Strange's Hindu Law, 22) that the doctrine in question is a peculiarity of Southern India. The decision of *Sir Thomas Strange* above spoken of was passed in 1813, long prior to the 2nd edition of his work (1830). The statement in this decision as to the kind of estate which a mother takes from her son is a mere *obiter dictum* and had nothing to do with the merits of that case. Further the foot notes clearly show that the Chief Justice was referring to *Jagannatha* at the time. It is respectfully submitted therefore that the grounds upon which the learned Judges proceeded as the reason for abandoning the Madras doctrine are of a shadowy nature.

Bombay decision.

In Bombay, however, the Judges have adopted more liberal views as to a woman's inheritance. Various have been the cases there decided on this question. The earliest case of authority there is reported in 1 Bombay Reports, 130, known as *Devkoorabai's* case in which it was decided on the authority of the *Vyavahara Mayukha* and the *Mitâxarâ*, that *daughters* inheriting immoveable estate from a *father* take absolutely. The decision by *Sausse, C.J.*, seems to have been passed after much deliberation, and after consultation with the *Pundits.*[a] The next case is reported in 1 Bombay Reports, 117, in which it was held citing with approval the last case, that *sisters* inheriting to a *brother* take an absolute estate in immoveable property by analogy to daughters. All the authorities are cited and reviewed in this case also. The next is in 1 Bombay Reports, 209, in which it is held that immoveable property inherited by a *married woman* from her *father*, whether or not it be strictly entitled to the name of *Stridhana*, descends on her death to her own heirs, and not to her father's ascendants. An inheritance thus descending to a *married woman* from her *father*, *classes* as *Stridhana* and descends accordingly. The next of importance is in 6 Bombay Reports, 1, passed by *Sir Joseph Arnould*, in which it was decided that a *sister* inheriting to her *brother*, takes his property as *Stridhana* with an *absolute power of disposition over it*, and such property upon her death passes in the first instance to her daughters. And further that property acquired by a married woman by inheritance *with the exception of property inherited by a woman from her husband*, classes as *Stridhana*, and descends accordingly.

a This case seems to have been approved by the Privy Council. See 9 *Moore*, 528.

The last and most important of all the decisions is that of *Mr. Justice West* reported in 8 Bombay Reports, 244. This judgment derives importance not only from the fact of its being the judgment of one well versed in Hindu law and literature, but it elaborately reviews the whole law upon the subject. It holds that the *Mitâxarâ* recognises only one class of *Stridhana* and includes in that class *all* property *acquired by a woman by inheritance.* It decides that over *Stridhana* acquired by *inheritance,* so far as it consists of *immovable* property, a woman's power of alienation is limited, that the *Vyavahara Mayukha* considers property acquired by a woman by inheritance to be *Stridhana,* but classes *Stridhana* under two heads :—*Stridhana* in a narrower sense, embracing particular species for which a peculiar mode of devolution is prescribed, and *Stridhana* generally, including *Stridhana* acquired by inheritance, which descends in the same line as if the woman had been a male, that is, to her sons and the rest, and this notwithstanding her having left daughters.

From these cases of the Bombay Courts it will be observed that the decisions gradually proceed from the qualified statement that some women, under given circumstances, take an absolute estate by inheritance to the general doctrine laid down by *Mr. Justice West,* that all women by inheritance obtain the estate as *Stridhana.* But this last decision, though it may be regarded, in one sense, as an advance upon the ordinary Bombay doctrine up to that time received, nevertheless seems to make a sort of compromise of the matter in dispute; for while it classes all the property a woman inherits as *Stridhana,* it at the same time places a restriction upon a woman's power of alienating immovables. That is to say they will not be allowed to alienate them *at mere caprice,* but will be in that respect subject to the control of their male relatives.

The whole subject has been exhaustively reviewed by the learned Judge, and the judgment is well worth perusal. With reference to the disputed doctrine of the *Mitâxarâ, Mr. Justice West* remarks that *Vijianeçwara* in his argument regards the term *Stridhana* in its *etymological* sense, (Chap. II, Sec. 11, para. 3.) This sense will include all property, which a woman gets by inheritance, or by any other mode of acquisition as *Stridhana.* The refinements, therefore, that arise in the Eastern school as to what does and what does not constitute *Stridhana* do not appear under the *Mitâxarâ.* And in this respect, no light matter, this definition of *Stridhana* has the advantage of simplicity. The learned Judge therefore adopts the doctrine of the *Mitâxarâ* as applicable to Western India with the qualification attached to it, that as regards the alienation of immovable property inherited,—

she shall be subject to control, as this seems in accordance with the spirit of the ancient law. This decision appears to state accurately the law on the subject of *Stridhana*. Although it does not give the woman the power of absolute disposal over immovable property inherited, it must be remembered that according to Hindu law there is no such thing as an absolute estate. Even among males, landed property, though it be self-acquisition, is not alienable without the consent of the co-heirs. And even with regard to *Stridhana* proper, where it consists of *immovable* property, it has been held by the Madras High Court (5 Madras Reports, 111) that it is not alienable without the consent of the woman's daughters, who are the reversioners. Under the judgment of *Mr. Justice West* the female is placed in a position analogous to that of the male.

Division of *Stridhana* into two heads.

As to the division of *Stridhana* into two kinds-adopted by *Nilakantha*, the author of the *Vyavahara Mayukha*, this has been approved of by some text writers. *Sir W. Macnaghten*, page 38, seems to consider that a woman's estate may be so divided. First, there is what may be called a woman's general estate, and secondly, her *peculium* or *Stridhana* proper. This division appears to have received some countenance from the Privy Council, for in their judgment above referred to (11 Moore's Indian Appeals, 487) they refer to it as a plausible statement of the law. It is also considered by *Mr. Norton* (1 *Leading Cases,)* as a not improbable solution of the *Stridhana* question.[a] Up to the present time the judgments of their Lordships on this subject have chiefly had regard to the widow.[b] And the doctrine of the *Mitâxarâ*, as contained in the disputed text, has been declared by them to be ambiguous. But the question will doubtless receive fuller discussion than it has hitherto done, in connection with the present case.

Social view of the question.

Independently however of the legal aspect of the question, it seems incongruous in these days to deny to Hindu women at any rate in

a Accordingly to Mr. *Mayne* the view of *Nilakantha* as stated in the *Vyavahara Mayukha* is really the view stated by him in the text, that is, the view taken by the *Bengal and Madras High Courts* of the question. It does not however, appear that *Macnaghten* was of the same opinion. At p. 38 he says, "In the *Mitâxarâ*, whatever a woman may have acquired, whether by *inheritance*, purchase, partition, seizure or finding is denominated *woman's property*, but it does not constitute her *peculisms*." He probably meant that over the former she would not have *absolute* control, as she has over the latter. This is *Mr. Justice West's* position.

b See Note *ante*.

Southern India rights which they undoubtedly possess as to property. It is unsafe, considering the general ignorance of *Sanskrit* that prevails, to assert that the law books on the subject are interpolated. Those who know *Sanskrit* assure us that they are not. The difference between the *Mitâxarâ* and the *Dâya-bhâga* is easily accounted for, and the reason of it has been frequently insisted on in these pages. We have no right to lay down the law for Bengal, it is hardly fair therefore to thrust upon Southern India the peculiar tenets of a school which has adopted Mahomedan notions as to the *status* of women. Morally speaking, in thus treating the women of this country we are doing them a cruel injustice. We are in fact encouraging a system among the Hindus, which, if it had been tolerated in Europe, would have been the means of securing us in a state of comparative bondage and semi-barbarism. There is no reason on earth why Hindu women should be placed in a position inferior to Hindu men. Generally speaking, they are not much inferior to men in point even of education, for the whole race, as a mass, is comparatively speaking uneducated. It is said they are more likely to be imposed upon. But this is to beg the question, and to assume their mental inferiority. There are myriads of male Hindus uneducated, superstitious, in no better condition than the females, who still are allowed the fullest rights as to property, so far as they are consistent with the Hindu law. It seems anomalous, therefore, that women should not have similar privileges, particularly when those privileges are granted to them by their law. Belonging as we do to the civilized nations of the West, it comes with an ill-grace from us to seek to circumscribe their liberties. The position of Hindu women is one of comparative bondage. Nothing, it is submitted, will tend more to perpetuate this condition than depriving them of legitimate rights over property. Up to the present time the decisions of the Courts have dealt chiefly with the *status* of the widow.[a] Her rights have been restricted, and the position of the other female members of the family have been to some extent, placed upon an analogy to it. The position of the widow in Hindu society is miserable enough, and needs no aggravation. Probably, if a widow were allowed more freedom in the use of property, she might be able to emancipate herself from this forlorn condition. There must be thousands of women who fully appreciate the inhuman and helpless position they are placed in by an antique code of laws, or rather by the interpretation of an antique code of law, and who must be only too willing to improve that condition, if they had the means

a See Note *ante*.

at their disposal. Mammon is a god who commands respect in all societies. A woman of fortune with the power to use it, would be just as much an object of respect and of adoration in India as well as elsewhere. The example of one strong-minded Hindu female in the matter of *re-marriage*, for instance, or of the education of her children would be catching. Hundreds, perhaps, would emulate her. And the general elevation of the whole race might thus become a problem far more easy of solution than what it is now generally conceived to be. If the Courts were to supplement the efforts of educationists by establishing the legal rights of the female, so as to raise her in the social scale, and enable her to regain the position she seems to have fallen from, it is impossible to calculate the beneficial results which would accrue to the country. It is submitted that so important a case as the present would be a fitting opportunity for the highest Court of Appeal to go exhaustively into the question of women's rights to property, under the *Mitâxarâ* as understood in *Southern India*. And if it be true, as *Sanskrit* scholars affirm that under the *Mitâxarâ*, according to the law as at present administered, Hindu women have the full enjoyment of their rights curtailed, let the truth be finally ascertained, and the matter settled once and for ever in the judgment of this case. It is submitted, therefore, that, women under the *Mitâxarâ* acquire *Stridhana* by *inheritance*, and that on this ground the *Sivagungah* estate passes as the *Stridhana* of the late Rani to her daughters, the second, third and fourth defendants in this case.

Concluding remarks.

I am not unconscious that some of these remarks are considered rather heterodox by Hindus generally. But I have allowed them to stand, because in my humble opinion it is high time that the leading members of the Hindu community should do some thing for the elevation of their women. In almost every country in the world the freedom and capacity of women are recognized, and in Europe and America their ability to cope with men even in the higher walks of science and art have been placed beyond doubt. Indeed so clearly has this been proved that, in these countries, they are allowed to compete with the male sex at the public Universities. It is in India alone, of all civilised countries, that women are still kept in the position of servants of the household. I am aware that there are several influential Hindu gentlemen in Madras and elsewhere who have taken steps for the amelioration of women in the matter of education, &c., but these efforts are confined to comparatively few, they have not taken, as they ought to, the form of a popular movement. It may be safely predicated that so long as the Hindu female

is encouraged to aspire to nothing more than the position of a household drudge, so long will India's sons aspire to nothing higher than a state of absolute dependence.[a]

[a] Since writing the above, it has been announced in the public papers that, a meeting of influential Hindus was held in Madras to consider the question of the *re-marriage* of the Hindu widows. It is worthy of note that at this meeting *Mr. Justice Muthasami Iyer* was present. In Bombay the *re-marriage* of Hindu *widows* may be considered as *un fait accompli*.



APPENDIX B.

EXCERPTS FROM THE JUDGMENT OF THE HIGH COURT IN THE SIVAGUNGAH CASE.

Mr. Justice Innes.

First as to the question of impartibility.—It appears to me that it is very doubtful upon the evidence whether the estate is impartible. It clearly is not a Raj, though Lord Clive in his Proclamation (page 97, Appendix Blue book) speaks of the widow as a princess. Nor does it seem to me to be in the nature of a Raj as it has none of the distinctive incidents of a petty sovereignty. Carved out of the old Ramnad estate in 1730 it escheated about 1792 and in 1801 and entirely fresh grant of it as it appears to me was made to a collateral relative of the original Zemindar of 1730. The Government (probably from policy) considered the claims of some other collateral relatives and rejected them. The proclamation recites that the Governor in Council "has been pleased to nominate, appoint and constitute "Padamattoor "Wodiya Tever collaterally descended from the progenitors of the "first Zemindar of *Sivagungah*, Sheshavarna Tever, to be the present "Zemindar of *Sivagungah*." It is obvious that the object aimed at was to settle the country, and with this view to continue the estate on the same footing as before to a member of the same family. If in this light it can be regarded as having existed from 1730 to the present time, the length of time during which it has continued impartible is not of itself sufficient, having regard to the circumstances to establish the incident of impartibility as attaching to the estate; for the first Zemindar had only one son who could not claim as against his father a share in his separate acquisition. Then came the son who had no co-parceners and after him the widow of the late Zemindar. The new creation in 1801 did not leave room for any demand for partition, and the Istimrar Zemindar had no sons. In 1829 the estate went to his nephew and on his death in 1831, his son took the estate and died in 1845. In 1831 commenced the long litigation which only terminated in 1863. The fact therefore that there has not been a partition since 1730 goes very little way as it appears to me towards showing that the estate is impartible. It is apparent that the late Zemindar (page 90, Appendix Blue Book) thought that it was partible. By "partible" however is meant that in which a co-parcener can *claim* partition. Every estate is "partible" in the sense that however long the custom of impartibility may have existed he who singly

possesses the entire interest can apportion the estate of his own single will or if the holder has co-parceners, he and they collectively may do so by joint consent. The Zemindar in his replies to the questions sent him to be answered refers apparently to what he regarded as allowable on the part of a head of a family and not to the rights of co-parceners to demand partition. The sunnud in 1803 authorizes the Zemindar to hold in perpetuity to him himself his heirs, successors and assigns and the natural conclusion is that it has attached to it the ordinary incidents of a Hindu estate.

As to what is said of admissions—1st defendant certainly did not admit that the estate was impartible. 2nd, 3rd, and 4th defendants set up impartibility in the sense that the estate was not an ordinary ancestral estate, but one entire and absolute estate vesting solely in the Rani to the exclusion of all but her own line. This is no admission that if the estate devolves upon daughter's sons as a class it is impartible among that class and can be held by but one of their heirs at a time.

The judgment in the *Sivagungah* case also is not conclusive because partibility or impartibility was not a question in that suit and what was said by the Judicial Committee as to that character of the estate was mere *obiter dictum*. It may be the policy of Government to keep such estates together, but there is no law against breaking them up. For revenue purposes such estates may be recognized as an entirety, and subject to certain liabilities if the peshcush is not paid on the whole, but this imposes no restriction upon partition though such an estate when broken up may still, for revenue purposes, be regarded as one entire estate. Nothing therefore can be concluded in favour of impartibility from the mere creation of such estates and the placing them in the hands of a single holder. The public belief or consciousness as to impartibility of such estates is difficult of ascertainment and would probably resolve itself into a belief in the permanence of that condition of things with the existence of which the people were familiar. We have no evidence of it in the present case and I think it would be of little value if we had.

I do not think that the view I take is necessarily inconsistent with that taken in the Padamattoor case as to the impartibility of that estate, because the existence of an estate which has by custom become impartible within the ambit of a partible estate is quite possible.

At all events the fuller consideration of the question in the present appeal has led me to the opinion I now entertain upon the question of impartibility as regards the zemindari of *Sivagungah*.

No opportunity has been afforded in the succession to this zemindari of enforcing a rule of primogeniture if any such existed nor is there any trace of its existence otherwise. If anything the evidence is rather the other way since the Istimrari Zemindar was the younger of two brothers the elder of whom though originally proclaimed by Government as Zemindar waived his claim as a collateral in favor of the younger.

The conclusion I arrive at is that the custom of impartibility and primogeniture have not been made out.

If the estate be impartible and this I believe is the opinion of the majority of the Court, then I agree that although no custom of primogeniture has been proved the rule of primogeniture in the case of two competing grandsons should be followed. There is no evidence absolutely negativing such a custom or showing the existence of any custom inconsistent with such a custom. The holder of a Zemindari is in a position which does not interfere with the rule of succession further than to vest the possession and enjoyment of the corpus of the whole estate in a single member of the family subject to the legal incidents attached to it as the heritage of an undivided family. The unity of the family right to the heritage is not dissevered any more than by the succession of co-parceners to partible property but the mode of its beneficial enjoyment is different. Instead of several members of the family holding the property in common one takes it in its entirety and the common law rights of the others who would be co-parceners of partible property are reduced to rights of survivorship to the possession of the whole dependent upon the same contingency as the rights of survivorship of co-parceners *inter se* to the undivided share of each and to a provision for maintenance in lieu of co-parcenery shares. (Sec. VI Mad. H. Ct. Reports p. 105. The position of a Zemindar is then analogous to that of the managing members of a family and this analogy in the case of two members of the family of the same class and equally remote from the holder whose heir is to succeed suggests the succession of the elder as that which is fittest, as being most in accordance with the spirit of the Hindu Law.

Mr. Justice Muthusami Iyer.

As to *daughter's estate, independently of the question of Stridhana*:—The third question for decision is whether a daughter inherits for herself and her own heirs or whether she takes a qualified heritage in the nature of a personal provision so as to pass the inheritance on upon her death to her father's heirs. For the purpose of deciding this question, I assume that what she inherits from her father does not become her *Stridhana,* and whether or not it is

Stridhana is a question which I shall separately consider. As far as I am aware, there is no text either in the *Mitâxarâ* or other Commentaries in this part of the country which in terms deals with this subject, and we have therefore to rest our decision on the reason of daughters' succession and on general principles applicable to women. In the case of an appointed daughter, the heritage passed upon her death to her father's, instead of her own, heirs. Referring to the texts of Canka, Lichita, and Parthinasi and *Manu*, the author of the *Dâya-bhâga* arrives at the conclusion that her father's heirs take the heritage after her death (*Dâya-bhâga*, Chap. XI, Sec. ii, V. 15), and there is nothing in the *Mitâxarâ* to lead us to a contrary conclusion. The appointed daughter was considered by a fiction of law to be a legitimate son, and her son was placed in the 3rd description of sons.—*Mitâxarâ*, Chap. I, Sec. xi, V. 3 and the cause of her succession was the appointment which was usually made in these words, "This damsel who has no brothers I will give unto thee decked with the ornaments; the son who may be born of her shall be my son, Vasishta (*Mitâxarâ*, Chap. I, Sec. xi, 3.) Thus her position as heir was much higher than that of a daughter without appointment. The latter is considered to be only [a] equal to the son, while the former was in law the [b] son himself, the one was excluded by her after-born brother, while the other shared the [c] heritage with him, and the appointed daughter was [d] an heir long before the widow and daughter had a place in the list of heirs. If notwithstanding her superior position as heir, the succession of an appointed daughter was only a case of interposition, it is unreasonable to say that the estate taken by a daughter is absolute.

Again, the position of a daughter as heir is inferior to that of the widow. The former takes under and after the latter, and the one is the associate of her husband in Agnihotra and other [e] sacrifices, while the other is only the means of producing a *sapinda* to her father. Though she is compared to a son in respect of consanguinity to her father, yet the equality is not perfect, and exists only to a limited extent, for a son excludes the widow, while the daughter is excluded by her. *Smṛti Çandrikâ*, Chap. XI, Sec. ii, 4, it is said, "In springing from the limbs of the father, a daughter is equal to a son." The

a *Mitâxarâ*, Chap. II, Sec. ii, 2.
b *Manu*, Chap. IX, 130.
c *Manu*, Chap. IX, 134.
d Compare *Mitâxarâ*, Chap. II, Sec. i with Chap. I, Sec. xi.
e *Mitâxarâ*, Chap. II, Sec. i, v, 5; *Manu*, Chap. IX, 45 and 86, I *Smṛti Çandrikâ*, Chap. XI, Sec. i, v, 12.

difference however, is this—In the procreation of a son, the contribution of the father's part is greater; whereas in that of a daughter, it is less, it being declared, "A male child is procreated if the seed predominates, but a female child is procreated if the woman contribute most to the fœtus." Thus the daughter stands in relation to her mother in the same subordinate position in which a son stands in relation to his father. If then on the authority of the text [a] of Catyayana, the husband's heirs inherit the property on the death of the widow to the exclusion of her own heirs, there is no valid reason for supposing that the estate taken by the daughter is higher than that of the widow.

Again, the historic development of the Hindu Law regarding women furnishes reason for saying that the term, widow, is, as observed by the author of the *Dâya-bhâga* (*Dâya-bhâga,* Chap. XI, Sec. ii, 31), one of general import and applicable to all women alike, originally, all women were excluded from inheritance by reason of their sex. This rule of exclusion is mentioned in *Smṛti Çandrikâ,* Chap. XI, Sec. i, 56, in *Mâdhavîya,* page 32, para. 44, and in *Mitâxarâ,* Chap. II, Sec. i, 14; and the cause of exclusion was their sex and not widowhood. The first exception to this rule was the case of appointment to produce an heir, and the principle on which it rested was that they then took not in their own right, but in right of their progeny. This applied both to the widow and the appointed daughter. The next exception was the recognition of certain females as heirs on the authority of special Vedic texts. In the case of the widow, *Vrihaspati* says that according to scripture she is half the body of her husband, and in the case of the daughter, he says she is equal to the son. In connexion with these Vedic texts, there were two classes of *Smṛties,* those which recognized them as forming an exception to the general rule of exclusion, and favored the succession of the widow and daughter, and those which did not recognize them as an exception at all, but gave the heritage to the father and brother in preference to the widow and daughter. Whether this conflict is due historically to tribal or other distinctions, it is not now easy to determine, but the fact is clear that there were conflicting [b] texts and that they either admitted or excluded both as heirs, one after the other.

The next period was that of Digests in which Sankara's rule of interpretation, *viz.,* all the texts are to be considered as if they formed one harmonious whole and applied to the whole *Sanskrit* speaking race, came into use as a rule of law (Introduction to *Dâya-Vibhâga*

a "After her, let the heirs take it." (*Sṛmti Çandrikâ,* Chap. XI, Sec. i, 32.

b *Mitâxarâ,* Chap. II, Sec. i, v, 6 and 7.

Mâdhavîya, XIII) and as one in accordance with which all the commentaries were to be written.

The first interpretation under this rule consisted in referring the texts in favor of the widow and daughter to the case of an appointment to raise up issue. It is refuted by the author of the *Mitâxarâ* in Chap. II, Sec. i, and it is ascribed to one *Dareswara*, Chap. II, Sec. i, 8. The interpretation substituted by *Vijianeçwara Yogi* referred the texts against the widow and daughter to co-parcenery and the texts in their favor to a divided family. From this it appears that before the date of the *Mitâxarâ*, both the widow and daughter were alike excluded from inheritance, and that, from the time of *Vijianeçwara Yogi*, they were both admitted as heirs, to divided property. In refutation of *Daresvara's* theory, the author of the *Mitâxarâ* refers first to the Vedic rule of exclusion, which related to all women, and says that it is applicable to property expressly acquired for sacrifice; 2ndly, he refers the texts against women to co-parcenery by which both the widow and the daughter are likewise excluded from inheritance; 3rdly, he alludes to their competency to own property by instancing their ownership in *Stridhana;* and 4thly, he refutes the argument that the appointment to raise up issue was the cause of their succession, an argument which applies to both. Thus it appears that the widow and daughter have been treated as taking on the authority of the same *Smṛtis*, and that the discussion in *Mitâxarâ*, Chap. II, Sec. 1, relating to the widow is equally applicable to the daughter.

Among the texts, which are in favour of the widow, the texts of *Bṛahaspati* and *Katyayana* show distinctly that the widow took but a qualified heritage. *Katyayana* said, "Let the sonless widow preserving unsullied the bed of her lord enjoy the property with moderation until her death. After her, let the heirs take it." (*Smṛti*, Chap. XI, Sec. i, 32. *Vrihaspati* said likewise, "After the death of the husband, the widow shall retain the share of her husband so long as she lives, but she has not property to the extent of mortgage or sale." (*Smṛti, Çandrikâ*, Chap. XI, Sec, i, 28). These texts are mentioned in *Mâdhavîya*, p. 33, and *Vyavahara Mayukha*, Chap. IV, Sec. 8, paras. 3 and 4. Again, in one of the passages, *Vrihaspati* declared that women were incompetent to take real property and said, "Even if virtuous, and if partition have been made, a woman is not fit to enjoy real property." The author of the *Smṛti Çandrikâ* says, "The object of this passage is to explain that real property being the means of subsistence among the descendants of a Hindu family, a widow having no issue is incompetent to take it. (Sm. Chap. XI, Sec. i, 27)" This text of *Vṛihaspati* has been construed with refer-

ence to that of *Katyayana* only to impose a restriction on the alienation of immoveable property. Again, the reason mentioned for the restriction on the widow's power of alienation by the Judicial Committee is the state of every woman being one of perpetual tutelage. (*The Collector of Masulipatam* versus *Kavali Venkata Naranappa*). Thus it appears to me that the very texts under which the widow and daughter are recognized as heirs gave them but a qualified heritage and that the reason for which the widow's power to alienate was restricted, applied equally to the daughter. It looks as if the *Smṛtis* in their favour converted the vedic rule of exclusion from inheritance into one of restriction on the alienation of immoveable property in the interest of the heirs obstructed by their succession. I may also add that in the *Dana Dharma* of *Mhahabharata*, a religious work held in great reverence in this part of the country, it is said, "For *women* the heritage of their husbands is pronounced applicable to use. Let not women, on any account, make waste of their husbands' wealth."

As to the reason of the daughters' succession, it is contended on the authority of the text of[a] *Vrihaspati* that her relationship to her father is the sole cause of her succession. Though no other reason is mentioned in the passages in the *Mitâxarâ* that relate to her, still in the case of her son, his position as a *sapinda* and his equality to the sons' son in connection with funeral oblations are mentioned as the cause of his succession (*Mitâxarâ*, Chap, II, Sec. ii, V, 6.

It is to be observed that the daughter's position as heir may be regarded from a two-fold stand point, 1st, in connection with the general theory of spiritual benefit; and 2ndly, in relation to her son, the *sapinda* produced by her, and the deceased's father, both of whom she excludes. It seems to me that the text of *Vrihaspati* is cited as a reason for her excluding her son, through whom she is connected with the funeral cake, and her father who confers superior spiritual benefit; and I fail to see how relationship can be considered to be the *sole* or even *primary* cause of her succession, since incompetency to confer spiritual benefit is ground for excluding from inheritance even a son to whom she is only said to be equal in one sense. This view receives corroboration from *Smṛti Çandrikâ*, the author of which cites a text of Nareda and arrives at the conclusion that the text of *Vrihaspati* discloses the reason why she is preferred to her father's father, and that the primary cause is her son's competency to offer funeral oblations to her father, (*Smṛti Çandrikâ*, Chap. XI, Sec. ii, 9 and 10 and 12). The *Mâdhavîya* and *Vyavahara Mayukha*

a *Mitâxarâ*, Chap. II, Sec. ii, 2.

are mere transcripts of the *Mitâxarâ*. Upon the commentaries of authority, therefore, in this part of the country, relationship is ***not*** the *sole* cause of her succession, and her connexion with the pinda through her son is the primary motive for her succession. In this view the texts of *Dâya-bhâga* and *Dayakrama Sangraha* relied upon in the judgment in the declaratory suit are pertinent. The reason mentioned by the Judicial Committee in the *Collector of Masulipatam* versus *Kavali Venkata Naranappa* in the state of perpetual tutelage, a reason which is applicable both to the widow and daughter and has reference to the sex and not to widowhood. Another reason mentioned in *Smṛti Çandrikâ*, viz., that real property is designed for the subsistence of heirs is also applicable to both. Hence in a double sense her heritage is a qualified one. The text of *Katyayaua* as read by Commentators together with that of *Brihaspati* imposes a twofold restriction, one upon alienation and the other upon succession. It should also be observed that the text of *Katyayana* which speaks of the sonless widow does not imply that a widow with a son is competent to alienate. For in the latter case, there can be no doubt of her incompetency to alienate, and the text means that even a sonless widow is incompetent to alienate. As to the texts (II. Dig: Hig: Edit. 159), which enjoin to the widow a life of ascetic privation, they affect the mode of enjoyment, in respect to which there is a difference between widows and women under coverture, and these ought not to be confounded with those that relate to the character of the heritage. For these reasons the conclusion I come to is that the heritage of a daughter is special and qualified as in the case of a widow, and that, on her death, her father's heirs, as contradistinguished from her own heirs, take it.

Mr. Justice Innes.

As to Stridhana.—The view that the estate devolves on the Rani's heirs depends upon whether as property inherited by a woman it follows the mode of descent to the kinsmen of the woman peculiar to property called woman's separate property (See *Mitâxarâ*, Chap. I, Sec. 3, para. 8 and Chap. II, Sec. 1, para. 7) and to which a special mode of devolution is attached. The contention of the appellants is that it does so devolve, and they base their contention on the express language of the *Mitâxarâ*, Chap. II, Sec. 11.

The author of the *Mitâxarâ* in Chap. II, Sec. 1, considers the devolution of the property of a man dying without issue and determines that if the widow survives she takes the whole estate.

In Chap. II, Sec. 11, in which he proceeds to consider the distribution of the property of a woman upon her death, he appears to lay it

down that all property inherited by a woman is woman's property and subject to the mode of devolution after her death peculiar to such property, and it is well recognized that the *Mitâxarâ* is the sole authority for this position.

In the commencement of Chap. II, Sec. 11, after stating general rules on the subject of inheritance of woman's property and giving instances of such property, none of which corresponds with property acquired by inheritance from a male, the Commentator goes on to say in Article 8, " A woman's property has been thus described. The " author next propounds the distribution of it. The kinsmen take it " if she die without issue."

Articles 9 to 11 assume that the person whose property has on her death devolved, has left no issue, while Articles 12 to 25 relate to the case in which the owner dying has issue evidently either sons or daughters or both. The children and their descendants in certain orders are declared to be heirs, the sons coming after the daughters, and the 25th Sec. concludes the subject with the words " on failure of " grandsons also the husband and other relations above mentioned " are successors to the wealth." The reference in the words " above mentioned" is to the parents of the owner mentioned in Articles 9 to 11 in which is set forth the succession to property inherited by a woman who dying leaves no children. These articles seem to assume the existenee of the owner's husband and parents at the date at which the property was inherited. But if this is so, they cannot have relation to property inherited by a woman from a male.—*Mr. Justice West* suggests in the case reported in 8 Bombay H. Ct., p. 240 that the husband is only named as a possible heir, and there is, no doubt, force in the remark to be found at page 484 of the 2nd edition of *West* and *Buhler's* Hindu Law of Inheritance and Partition that " no one would " contend from the mention of the parents as a man's heirs that the " rules for inheritance of a man's property apply only to property " acquired during the parents' lives."

But none of the Hindu text books, treatises or commentaries either before or after the time of the author of the *Mitâxarâ* lends any support to this view of the descent of property inherited by a woman from a male; and the concurrence of the later Commentators and writers of treatises in either excluding property inherited from males from the mass of woman's peculiar property or in not including it in it, and in making the estate devolve upon the death of the widow upon the heirs of the husband tends to shew that the law as it was handed down to these later writers from a period prior to the time at which the author

of the *Mitâxarâ* lived, was not the law which it is assumed the author of the *Mitâxarâ* intended to propound. If then he had that intention, he would have been giving to the world a doctrine which differed from what appears to have been before and after his time the accepted doctrine, and in the absence of evidence as to any change in the law in this respect existing at the period at which the author wrote, it would be natural to expect that he would have dwelt with particularity upon the mode of descent upon which he insisted and would not have left it to be vaguely deduced from the very general language of the text of Gautama inserted at the close of the 2nd Article of Sec. 11, Chap. II, and the tenor of Articles 1, 2, 3 and 4.

He considers the devolution of the property in two main divisions that of the deceased woman having no issue and that of her having issue and divides the former into two subordinate divisions in which the kind of marriage the woman may have made determines the devolution of the property. No attempt is made to illustrate specially the doctrine as to the devolution of property inherited by a female from a male, and the several rules from Articles 8 to 25 are quite consistent with the author having intended them to be confined in their application as regards inherited property to the descent of woman's property derived from a woman. On the assumption that he intended the more general application contended for he certainly shewed by his cursory treatment of the question an indifference which is not displayed in other parts of his work to the perpetuation of opinions which he regarded as erroneous.

West, J., remarks at page 269 in the Judgment already referred to in reference to some observations to be found at page 205 of Vol. II of the Madras High Court Reports that it must be borne in mind that the author of the *Mitâxarâ* had earlier in the same Chapter dealt elaborately with the very topic of woman's inheritance especially a widow's inheritance from her husband. But the Sections as to the estate of the widow and daughters do not at all treat of the *devolution* of such estates, on the demise of the female inheritor, and the force of the conclusion of Chap. II, Sec. 1, para. 39, that the widow takes the whole estate of a man who being separated from his co-heirs and not subsequently re-united with them dies leaving no male issue does not consist in the word '*whole*' as an attribute to '*estate*,' for it was never disputed that if she took anything she took the whole, the force lies in that part of the conclusion which contradicts the views refuted that a woman only inherits if she be solicitous of authority for raising up issue. Nor does the word "whole" necessarily carry with it any implication of absolute ownership. As remarked in *West* and *Buhler*,

2nd edition, page 463, it is clear that a right of absolute disposal did not enter into *Vijianeçwara* conceptions of the essentials of ownership.

An estate may be regarded from two points of view. Its extent in mass and its duration in time. When there are restrictions upon the disposal of property by a man beyond his lifetime, as in the case of a man with sons, and the law determines what is to become of it after his death, his estate except so far as his own share is concerned which he may dispose of in his lifetime is only in the mass of the property during his life. Except as to that kind of *Stridhana* called *Çandrikâ* a woman has according to all Hindu lawyers who have treated on the subject no independent power of disposal of her *Stridhana*, and it is to be especially noted that in regard to immovable property which may be received from a husband she has no independent power of disposal. It goes to her heirs after her death. The author of the *Mitâxarâ* has laid down no rules as to a woman's power of disposal of her property; and it is not to be presumed that he differed from other Hindu writers in his views as to the limit of her power; and if property received by a wife from her husband is not such as can be disposed of by a woman in her lifetime, the law as to property inherited by a woman from her husband as *Stridhana* under the doctrine attributed to the *Mitâxarâ* cannot be supposed to have allowed her a larger power of disposal. Thus her estate would still be only in the mass of the property for her lifetime, and would correspond in this respect with the estate which under the ordinary view she is regarded as possessing. No stress therefore in favor of the view that property inherited by a widow from her husband descends as *Stridhana* to her heirs can rightly be laid upon the words "whole estate" in the concluding paragraph of Sec. 1, Chap. II, of the *Mitâxarâ*, as tending to shew that the estate intended by the author was of a distinct and a more ample character and carried with it a more ample and absolute power of disposal than what it would, if, after her death it devolved upon her husband's heirs instead of heirs.

On the other side it is contended that the order of succession to property inherited by a woman from her husband had been already set fourth by the author in Chap. II, Sec. 1, Article 2, which shews that after the death of the widow and daughters, property so inherited reverts to the husband's heirs, and that hence it may be inferred that nothing inconsistent with this could have been intended in Chap. II, Sec. 11. The reference is to the text of *Yâjñavalkya* in Chap. II, Sec. 1, para. 2 of the *Mitâxarâ*, "the wife, the daughters also, "both parents, brothers likewise, and their sons, gnyaties, cognates,

"a pupil and a fellow student; on failure of the first among these the "next in order is heir to the estate of one who departed for heaven "leaving no male issue." Upon a text of *Katyayana* "after her let the heirs take it" the law in regard to succession as laid down in this passage is by *Jimutavahana* and also in the *Viramitrodaya* which follows the *Mitâxarâ* and by the rest of the writers who follow it held to be that those persons who are exhibited in the passage as the next heirs on *failure* of prior claimants are likewise entitled in *succession* to such prior claimants. Or as it is expressed in the *Dâya-bhâga* those persons who are exhibited as the next heirs on failure of prior claimants shall in like manner as they would have succeeded if the widow's right had never taken effect equally succeed to the residue of the estate remaining after her use of it upon the demise of the widow in whom the succession had vested.

If this were the true import of the passage, "the wife the daughters also both parents, &c.," it would be impossible to say that the author of the *Mitâxarâ* had not set forth the order of the devolution of the property of a woman inherited from her husband, and the argument would be sound that the author having already in Sec. 1 of Chap. II, clearly laid down the order in which the heirs take and made daughter's sons take in succession to daughters as heirs of their maternal grandfather, nothing inconsistent with this could have been intended by the language of Sec. 11.

But the plain and obvious meaning of the passage apart from the text of *Katyayana* with which it is not connected by the author of the *Mitâxarâ* is that the first of the classes of heirs that should be surviving should take the estate. What was to become of it afterwards is neither expressed nor implied. And there is nothing to indicate that either *Yâjñavalkya* or his Commentator understood this text as setting forth the order in which the heirs should take in succession to one another.

If this be so the author of the *Mitâxarâ* had not dealt *specially* with the devolution of the property of a woman inherited from a male in any part of his treatise. And if on the one hand it be argued that in a section which declares all property however acquired by a woman to be *Stridhana* and then proceeds to deal with the devolution of *Stridhana* there is ground for saying that in so proceeding to deal with the subject property inherited from males by females was lost sight of or at all events was not specifically dealt with, and that the devolution of it is certainly not specifically provided for, and that hence it may be inferred that after all it was not intended to declare that property inherited from males should descend as woman's

peculiar property; it may with greater force be urged on the other side that the subject is no where else dealt with at all either specially or generally, and that the proper inference is that the rules as to the descent of woman's property given generally in Chap. II, Sec. 11, without any distinction between particular modes of its acquisition were intended to apply equally to property inherited by females from males as to other property classed under the general term *Stridhana*. It appears then that notwithstanding the meagre treatment of the subject by the author of the *Mitâxarâ* and the other grounds for doubting whether he really intended to declare that all property inherited by a woman from males should devolve on her death on her own heirs there is no means of accounting for the language employed except on the supposition that the general words were intended to have their full import.

But all the Courts including the High Court of Bombay are nevertheless agreed that in the case of the widow, the mother and grandmother the estate taken by them by inheritance from male members of their family reverts to the next heir to the last male holder in all those parts of India which acknowledge the authority of the *Mitâxarâ*.

As to these three female members of a family there can now be no question. The subject has been well sifted in numerous decisions, and these latter are supported by all the treatises on the Hindu Law of Succession not excepting those which follow the *Mitâxarâ*, and it must be conceded that whatever the ancient law may have been, the doctrine of the *Mitâxarâ* as to these three at least has not descended as law to the present time.

It has been consistently held by all Hindu writers who have expressly discussed the subject that if the widow first takes the inheritance upon her death that relative succeeds who would have been the heir of her husband if he had died at that time, and upon this all the decided cases are agreed, and according to all authorities the daughter is that heir.

The inheritance of the daughter, therefore, is not to her mother but to her father. But it is said a daughter takes an absolute estate and can devolve it upon her own heirs. Her daughter would thus be the heir before her son.

Analogy would suggest that the same reasons which exist in the case of the widow, the mother, and the grandmother for holding that their estate is special and qualified exist equally in the case of the daughter as they rest upon the principle of the want of independence of women and the necessity of preserving the estate for the heirs *i.e.*,

the heirs of the last male holder. Were the daughter's daughter to succeed after the daughter the estate would by reason of her marriage devolve in a different line, and the object of continuing it to the lineage of the last male holder would be defeated.

But a daughter's son stands on a different footing from a daughter's daughter and both by the Bengal school which puts the right to succeed upon the superior spiritual benefit to be conferred by him upon the grandfather (*Dáya-bhága*, Chap. XI, Sec. 1, verse 59) and by the *Mitákará* which puts it on the ground of propinquity Chap. II, Sec. 2, verse 6 and makes the duty of the offering follow the inheritance is placed upon the footing of a son's son, and although the text of *Manu* upon which the reasoning of the author of the *Mitáxará* is founded when rightly rendered applies only to the son of a daughter who either has been actually or impliedly appointed, and the text of *Vishnu* quoted attributes the character of a son's son to a daughter's son only in his capacity of an offerer the opinion of the author as to what the law was as it existed in his time is clear that a daughter's son is to be regarded as a son's son and is to take the inheritance upon that footing. But in the *Smṛti Çandrika* a text of *Vishnu* is quoted to the effect that where there exists no son or grandson the daughter's son inherits the wealth and *Varadaraja*, the author of the *Vyavahara Nirnaya*, says, "In default of son's son what is to be "done by son's sons is to be actively done by daughter's sons," and grounds his proposition upon the text of *Manu* from Chap. IX of the Institutes before referred to and two other texts that precede it.

I have before observed upon the text of *Yájñavalkya* quoted at commencement of Chap. II, Sec. 1, of the *Mitáxará* and upon the sense in which the words "upon failure" in connection with the text of *Katyayana* are understood by the Bengal school of writers and by the author of the *Viramitrodaya* and others who follows the *Mitáxará*.

Although their views are not admissible as and do not profess to be an exposition of the meaning of the passage standing by itself, they go far to show that the order of succession of heirs one to another corresponded at the several periods at which they wrote to that given in the text as the order in which in default of the prior named class the next surviving should succeed, and the daughter's son therefore after the decease of the daughter. And looking at the two objects mainly in view in the law regulating the descent of the estate, viz., the keeping the estate as far as possible in the line of those nearest related by blood to the deceased owner ("after her let the heirs take it") and the continuation of the deceased owner's male

line as shown by the exclusion of all but the excepted females, it would be unreasonable to conclude without clear authority that in the competition between the sons of a daughter and the daughters of a daughter who has inherited as heir to her father, the same objects are not recognized in the devolution of the estate after the death of the daughter as in the case of the widow, the mother, and the grand-mother. The books with exception of the *Mitâxarâ* in Chap. II, Sec. 11, and the authority of decided cases—excepting those which will now be noticed—are at one that the succession is to the daughter's sons.

The Bombay cases support the doctrine of the *Mitâxarâ* in reference to the devolution of the estate taken by a daughter from her father. Such an estate is said to descend as *Stridhana* and not to revert to the heirs of the father.

But as *Mr. Mayne*, in his learned work points out, one of those cases (1 Bombay H. Court 130) is unsatisfactory as it proceeds upon a text of *Manu* to which a different effect is given to what is given it in every other part of India. Another case (1 Bombay 209) is hardly an authority because the brother of the successful female was the last *male owner* and was the person to be traced from and in reality therefore she took as sister and not as daughter of the last holder (her mother). The case reported in 8 Bombay O. C., page 244, is the third. In this the sister of the last male holder was held to succeed on the death of the daughter of the last male holder. But in this case the result would in principle have been the same in Madras as the heir found entitled was the heir of the last male holder and except for the opinion of *Mr. Justice West* in his elaborate judgment as to the descent of property inherited by a woman from a male, the case can scarcely be regarded as of importance to a decision of the question as to the descent of property inherited by a daughter.

The decision in VI, Madras High Court Reports, and that in 14 Bengal Law Reports, page 235, *Chotay Lal* versus *Chennoo Lal* in which the decision at VI, Madras High Court Reports, is considered and approved and the cases in the Bombay High Court are dissented from are weighty authorities and the decision of the High Court of Calcutta just referred to has recently been confirmed in appeal by the Privy Council, and this last decision is a binding authority upon the point that the estate when so taken by a daughter does not go to her heirs upon her death but to the heirs of the last male holder; and according to all authorities the daughter's sons constitute that heir.

One of the questions however raised in the suit is whether the circumstances that *Kattama Nachiyar* was the only unmarried

daughter at her father's death, the only daughter with male issue at Angamuttu's death, and the only surviving daughter at the date of the Privy Council's judgment in her favor or any one of these circumstances can make the difference of giving her an absolute instead of a limited estate. But the rule as regards the estate taken by a daughter does not vary according to the existence or absence of any of these circumstances.

A passage in the *Dayâ-bhâga*, Chap. XI, Sec. 2, para. 30, is the sole foundation for the opinion that if a daughter in whom the estate has vested have issue, the inheritance is continued in her line.

This passage runs as follows: "But if a maiden daughter in whom "the succession has vested and who has been afterwards married "die (without leaving issue) the estate which was hers becomes the "property of those persons, a married daughter, or others who would "regularly succeed if there were no such (unmarried daughter) in "whom the inheritance vested."

The words "without leaving issue" have been held to imply that, if there be issue, the estate does not go to the surviving daughter but to the issue. But they are an interpolation of the Commentator, *Çri Krishna*, and it is not now doubted in cases governed by the *Mitâxarâ* Law that although the maiden daughter takes in competition with the married daughter, she cannot by having issue continue her estate in her line. It goes over to the nearest surviving heir of the male holder who in the case of daughters surviving would be those daughters. Danlat Kooer *versus* Burma Deo, 22 W. R., 55.

The conclusion therefore is that the estate on the demise of the Rani did not devolve in her line but in the line of the nearest heirs of her father who in the present case are the surviving sons of his daughters.

APPENDIX C.

ACT NO. XXI OF 1870.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

(Received the assent of the Governor-General on the 19th July 1870.)

An Act to regulate the Wills of Hindús, Jainas, Sikhs and Buddhists in the Lower Provinces of Bengal and in the towns of Madras and Bombay.

WHEREAS it is expedient to provide rules for the execution, attestation, revocation, revival, interpretation and probate of the wills of Hindús, Jainas, Sikhs and Buddhists in the territories subject to the Lieutenant-Governor of Bengal and in the towns of Madras and Bombay; It is hereby enacted as follows:— Preamble.

1. This Act may be called "The Hindú Wills' Act, 1870." Short Title.

2. The following portions of the Indian Succession Act, 1865, namely,—

so much of parts XXX and XXXI as relates to grants of probate and letters of administration with the will annexed, and

Parts XXXIII to XL, (both inclusive), so far as they relate to an executor and an administrator with the will annexed,

shall, notwithstanding anything contained in Sec. 331 of the said Act, apply—

(*a*) to all wills and codicils made by any Hindú, Jaina, Sikh or Buddhist, on or after the 1st day of September 1870, within the said territories of the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and Extent of Act.

(*b*) to all such wills and codicils made outside those territories and limits, so far as relates to immoveable property situate within those territories or limits:

3. Provided that marriage shall not revoke any such will or codicil: Provisos.

And that nothing herein contained shall authorise a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right of maintenance of which, but for Sec. 2 of this Act, he could not deprive them by will:

And that nothing herein contained shall vest in the executor or administrator with the will annexed of a deceased person any property which such person could not have alienated *inter vivos*:

And that nothing herein contained shall affect any law of adoption or intestate succession:

And that nothing herein contained shall authorise any Hindú, Jaina, Sikh or Buddhist to create in property any interest which he could not have created before the 1st day of September 1870.

Partial repeal of Bengal Regulation V of 1799, Sec. 2.

4. On and from that day Sec. 2 of Bengal Regulation V of 1799 shall be repealed so far as relates to the executors of persons who are not Muhammadans, but are subject to the jurisdiction of a District Court in the territories subject to the Lieutenant-Governor of Bengal.

Saving of rights of Administrator-General.

5. Nothing contained in this Act shall affect the rights, duties and privilges of the Administrators-General of Bengal, Madras and Bombay, respectively.

Interpretation clause.

6. In this Act and in the said Secs. and Parts of the Indian Succession Act all words defined in Sec. 3 of the same Act shall, unless there be something repugnant in the subject or context, be deemed to have the same meaning as the said Sec. 3 has attached to such words respectively:

And in applying Secs. 62, 63, 92, 96, 98, 99, 100, 101, 102, 103 and 182 of the said Succession Act, to wills and codicils made under this Act, the words "son," "sons," "child" and "children" shall be deemed to include an adopted child; and the word "grandchildren" shall be deemed to include the children, whether adopted or natural-born, of a child whether adopted or natural-born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son:

And in making grants under this Act of letters of administration with the will annexed, or with a copy of the will annexed, sec. 195 of the said Succession Act shall be construed as if the words "and in case the Hindú Wills' Act had not been passed" were added thereto; and sec. 198 of the said Succession Act shall be construed as if, after the word "intestate," the words "and the Hindú Wills' Act had not been passed" were inserted; and Secs. 230 and 231 of the said Succession Act shall be construed as if the words "if the Hindú Wills' Act had not been passed" were added thereto, respectively.

The following are the principal sections of the Indian Succession Act (Act X of 1865) above referred to.

PART VII.

OF WILLS AND CODICILS.

40. Every person of sound mind and not a minor may dispose of his property by Will. **Persons capable of making Wills.**

Explanation 1.—A married woman may dispose by Will of any property which she could alienate by her own act during her life.

Explanation 2.—Persons who are deaf, or dumb, or blind are not thereby incapacitated for making a Will if they are able to know what they do by it.

Explanation 3.—One who is ordinarily insane may make a Will during an interval in which he is of sound mind.

Explanation 4.—No person can make a Will while he is in such a state of mind, whether arising from drunkenness, or from illness, or from any other cause, that he does not know what he is doing.

48. A Will or any part of a Will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void. **Will obtained by fraud, coercion or importunity.**

49. A Will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by Will. **Will may by revoked or altered.**

PART VIII.

OF THE EXECUTION OF UNPRIVILEGED WILLS.

50. Every testator, not being a soldier employed in an expedition, or engaged in actual warfare, or a mariner at sea, must execute his Will according to the following rules:— **Execution of unprivileged Wills.**

First.—The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

Second.—The signature or mark of the testator or the signature of the person signing for him shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

Third.—The Will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the

Will, or have seen some other person sign the Will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

Incorporation of papers by reference.

51. If a testator, in a Will or Codicil duly attested, refers to any other document then actually written, as expressing any part of his intentions, such document shall be considered as forming a part of the Will or Codicil in which it is referred to.

PART X.

OF THE ATTESTATION, REVOCATION, ALTERATION AND REVIVAL OF WILLS.

Witness not disqualified by interest or by being executor.

55. No person, by reason of interest in or of his being an executor of a Will, is disqualified as a witness to prove the execution of the Will or to prove the validity or invalidity thereof.

Revocation of unprivileged Will of Codicil.

57. No unprivileged Will or Codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another Will or Codicil, or by some writing declaring an intention to revoke the same, and executed in the manner in which an unprivileged Will is hereinbefore required to be executed, or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Effect of obliteration, interlineation, or alteration in unprivileged Will.

58. No obliteration, interlineation, or other alteration made in any unprivileged Will after the execution thereof shall have any effect, except so far as the words or meaning of the Will shall have been thereby rendered illegible or undiscernible, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the Will; save that the Will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the Will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the Will.

Revocation of privileged Will or Codicil.

59. A privileged Will or Codicil may be revoked by the testator, by an unprivileged Will or Codicil, or by any act expressing an intention to revoke it, and accompanied with such formalities as would be sufficient to give validity to a privileged Will, or by the burning,

tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

Explanation.—In order to the revocation of a privileged Will or Codicil by an act accompanied with such formalities as would be sufficient to give validity to a privileged Will, it is not necessary that the testator should at the time of doing that act be in a situation which entitles him to make a privileged Will.

Revival of unprivileged Will.

60. No unprivileged Will or Codicil, nor any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a Codicil executed in manner herein before required, and showing an intention to revive the same; and when any Will or Codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown by the Will or Codicil.

Extent of revival of Will or Codicil partly revoked and afterwards wholly revoked.

PART XI.

OF THE CONSTRUCTION OF WILLS.

Wording of Will.

61. It is not necessary that any technical words or terms of art shall be used in a Will, but only that the wording shall be such that the intentions of the testator can be known therefrom.

Enquiries to determine questions as to object or subject of Will.

62. For the purpose of determining questions as to what person or what property is denoted by any words used in a Will, a Court must inquire into every material fact relating to the persons who claim to be interested under such Will, the property which is claimed as the subject of disposition, the circumstances of the testator and of his family, and into every fact a knowledge of which may conduce to the right application of the words which the testator has used.

Misnomer or misdescription of object.

63. Where the words used in the Will to designate or describe a legatee, or a class of legatees, sufficiently show what is meant, an error in the name or description shall not prevent the legacy from taking effect. A mistake in the name of a legatee may be corrected by a description of him, and a mistake in the description of a legatee may be corrected by the name.

When words may be supplied.

64. Where any word material to the full expression of the meaning has been omitted, it may be supplied by the context.

Rejection of erroneous particulars in description of subject.

65. If the thing which the testator intended to bequeath can be sufficiently identified from the description of it given in the Will, but but some parts of the description do not apply, such parts of the description shall be rejected as erroneous, and the bequest shall take effect.

When part of description may not be rejected as erroneous.

66. If the Will mentions several circumstances as descriptive of the thing which the testator intends to bequeath, and there is any property of his in respect of which all those circumstances exist, the bequest shall be considered as limited to such property, and it shall not be lawful to reject any part of the description as erroneous, because the testator had other property to which such part of the description does not apply.

Explanation.—In judging whether a case falls within the meaning of this section, any words which would be liable to rejection under the sixty-fifth Section are to be considered as struck out of the Will.

Extrinsic evidence admissible in case of latent ambiguity.

67. Where the words of the Will are unambiguous, but it is found by extrinsic evidence that they admit of applications, one only of which can have been intended by the testator, extrinsic evidence may be taken to show which of these applications was intended.

Extrinsic evidence inadmissible in case of patent ambiguity or deficiency.

68. Where there is an ambiguity or deficiency on the face of the Will, no extrinsic evidence as to the intentions of the testator shall be admitted.

Meaning of any clause to be collected from entire Will.

69. The meaning of any clause in a Will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other; and for this purpose a Codicil is to be considered as part of the Will.

When words may be understood in a restricted sense, and when in a sense wider than usual.

70. General words may be understood in a restricted sense where it may be collected from the Will that the testator meant to use them in a restricted sense; and words may be understood in a wider sense than that which they usually bear, where it may be collected from the other words of the Will that the testator meant to use them in such wider sense.

Where a clause is open to two constructions, that which has some effect is to be preferred.

71. Where a clause is susceptible of two meanings, according to one of which it has some effect, and according to the other it can have none, the former is to be preferred.

No part of Will to be rejected, if reasonable constructions can be put on it.

72. No part of a Will is to be rejected as destitute of meaning if it is possible to put a reasonable construction upon it.

73. If the same words occur in different parts of the same Will, they must be taken to have used everywhere in the same sense, unless there appears an intention to the contrary.

Interpretation of words repeated in different parts of Will.

74. The intention of the testator is not to be set aside because it cannot take effect to the full extent, but effect is to be given to it as far as possible.

Testator's intention to be effectutated as far as possible.

75. Where two clauses or gifts in a Will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

The last of two inconsistent clauses prevails.

76. A Will or bequest not expressive of any definite intention is void for uncertainty.

Will or bequest void for uncertainty.

77. The description contained in a Will, of property the subject of gift, shall, unless a contrary intention appear by the Will, be deemed to refer to and comprise the property answering that description at the death of the testator.

Words describing subject refer to property answering that description at testator's death.

82. Where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the Will that only a restricted interest was intended for him.

Bequest without words of limitation.

83. Where property is bequeathed to a person, with a bequest in the alternative to another person or to a class of persons;—if a contrary intention does not appear by the Will, the legatee first named shall be entitled to the legacy, if he be alive at the time when it takes effect; but if he be then dead, the person or class of persons named in the second branch of the alternative shall take the legacy.

Bequest in the alternative.

85. Where a bequest is made to a class of persons under a general description only, no one to whom the words of the description are not in their ordinary sense applicable shall take the legacy.

Bequest to a class of persons under a general description only.

88. Where a Will purports to make two bequests to the same person, and a question arises whether the testator intended to make the second bequest instead of or in addition to the first; if there is nothing in the Will to show what he intended, the following rules shall prevail in determining the construction to be put upon the Will:—

Rules of construction where a Will purports to make two bequests to the same person.

First.—If the same specific thing is bequeathed twice to the same legatee in the same Will, or in the Will and again in a Codicil, he is entitled to receive that specific thing only.

Second.—Where one and the same Will or one and the same Codicil purports to make in two places a bequest to the same person of the same quantity or amount of anything, he shall be entitled to one such legacy only.

Third.—Where two legacies of unequal amount are given to the same person in the same Will, or in the same Codicil, the legatee is entitled to both.

Fourth.—Where two legacies, whether equal or unequal in amount, are given to the same legatee, one by a Will and the other by a Codicil, or each by a different Codicil, the legatee is entitled to both legacies.

Explanation.—In the four last rules, the word Will does not include a Codicil.

Constitution of residuary legatee.

89. A residuary legatee may be constituted by any words that show an intention on the part of the testator that the person designated shall take the surplus or residue of his property.

Property to which a residuary legatee is entitled.

90. Under a residuary bequest, the legatee is entitled to all property belonging to the testator at the time of his death, of which he has not made any other testamentary disposition which is capable of taking effect.

Time of vesting of legacy in general terms.

91. If a legacy be given in general terms without specifying the time, when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and if he dies without having received it, it shall pass to his representatives.

In what case a legacy lapses.

92. If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property unless it appear by the Will that the testator intended that it should go to some other person. In order to entitle the representatives of the legatee to receive the legacy, it must be proved that he survived the testator.

A legacy does not lapse if one of two joint legatees die before the testator.

93. If a legacy be given to two persons jointly, and one of them die before the testator, the other legatee takes the whole.

Effect in such a case, of words showing testator's intention that the shares should be distinct.

94. But where a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then if any legatee die before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.

When lapsed share goes as undisposed of.

95. Where the share that lapses is a part of the general residue bequeathed by the Will, that share shall go as undisposed of.

When a bequest to testator's child or

96. Where a bequest shall have been made to any child or other lineal descendant of the testator, and the legatee shall die in the life-

time of the testator, but any lineal descendant of his shall survive the testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention shall appear by the Will.

lineal descendant does not lapse on his death in testator's lifetime.

97. Where a bequest is made to one person for the benefit of another, the legacy does not lapse by the death, in the testator's lifetime, of the person to whom the bequest is made.

Bequest to A for the benefit of B does not lapse by A's death in testator's lifetime.

98. Where a bequest is made simple to a described class of persons, the thing bequeathed shall go only to such as shall be alive at the testator's death.

Survivorship in case of bequest to a described class.

Exception.—If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise, the property shall at that time go to such of them as shall be then alive, and to the representatives of any of them who have died since the death of the testator

PART XII.

OF VOID BEQUESTS.

99. Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.

Bequest to a person by a particular description, who is not in existence at the testator's death.

Exception.—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest, or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or if he be dead, to his representatives.

100. Where a bequest is made to a person not in existence at the time of the testators's death, subject to a prior bequest, contained in the Will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

Bequests to a person not in existence at the testator's death, subject to a prior bequest.

101. No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the lifetime of one or more persons

Rule against perpetuity.

living at the testators's decease, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong.

Bequests to a class, some of whom may come under the rules in the Sections 100, 101.

102. If a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules contained in the two last preceding Sections, or either of them, such bequest shall be wholly void.

Bequest to take effect on failure of bequest void under Sections 100, 101, or 102.

103. Where a bequest is void by reason of any of the rules contained in the three last preceding Sections, any bequest contained in the same Will, and intended to take effect after or upon failure of such prior bequest, is also void.

PART XXIX.

OF GRANT OF PROBATE AND LETTERS OF ADMINISTRATION.

Character and property of executor or administrator as such.

179. The executor or administrator, as the case may be, of a deceased person, is his legal representative for all purposes, and all the property of the deceased person vests in him as such.

Administration with copy annexed of authenticated copy of Will proved abroad.

180. When a Will has been proved and deposited in a Court of competent jurisdiction, situated beyond the limits of the province, whether in the British dominions or in a foreign country, and a properly authenticated copy of the Will is produced, letters of administration may be granted with a copy of such copy annexed.

Probate to be granted to executor appointed by Will.

181. Probate can be granted only to an executor appointed by the Will.

Appointment express or implied.

182. The appointment may be express or by necessary implication.

Persons to whom probate cannot be granted.

183. Probate cannot be granted to any person who is a minor or is of unsound mind, nor to a married woman without the previous consent of her husband.

Grant of probate to several executors simultaneously or at different times.

184. When several executors are appointed, probate may be granted to them all simultaneously or at different times.

Separate probate of Codicil discovered after grant of probate.

185. If a Codicil be discovered after the grant of probate, a separate probate of that Codicil may be granted to the executor, if it in no way repeals the appointment of executors made by the Will. If

different executors are appointed by the Codicil, the probate of the Will must be revoked, and a new probate granted of the Will and the Codicil together. Procedure when different executors are appointed by the Codicil.

186. When probate has been granted to several executors, and one of them dies, the entire representation of the testator accrues to the surviving executor or executors. Accrual of representation to surviving executor.

187. No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction within the Province shall have granted probate of the Will under which the right is claimed, or shall have granted letters of administration under the 180th Section. No right as executor or legatee can be established, unless probate or letters of administration shall have been granted by a competent Court.

188. Probate of a Will when granted establishes the Will from the death of the testator, and renders valid all intermediate acts of the executor as such. Probate establishes the Will from testator's death.

189. Letters of administration cannot be granted to any person who is a minor or is of unsound mind, nor to a married woman without the previous consent of her husband. Persons to whom letters of administration may not be granted.

191. Letters of administration entitle the administrator to all rights belonging to the intestate as effectually as if the administration had been granted at the moment after his death. From what period letters of adminstration entitle administrator to intestate's rights.

192. Letters of administration do not render valid any intermediate acts of the administrator, tending to the diminution or damage of the intestate's estate. Acts of administrator not validated by letters of administration.

193. When a person appointed an executor has not renounced the executorship, letters of administration shall not be granted to any other person until a citation has been issued, calling upon the executor to accept or renounce his executorship; except that when one or more of several executors have proved a Will, the Court may, on the death of the survivor of those who have proved, grant letters of administration without citing those who have not proved. Grant of administration where executor has not renounced. Exception.

104. The renunciation may be made orally in the presence of the Judge, or by a writing signed by the person renouncing, and when made shall preclude him from ever thereafter applying for probate of the Will appointing him executor. Form and effect of renunciation of executorship.

Procedure where executor renounces or fails to accept within the time limited.

195. If the executor renounce, or fail to accept the executorship within the time limited for the acceptance or refusal thereof, the Will may be proved and letters of administration, with a copy of the Will annexed, may be granted to the person who would be entitled to administration in case of intestacy.

Grant of administration to universal of residuary legatee.

196. When the deceased has made a Will, but has not appointed an executor, or when he has appointed an executor who is legally incapable or refuses to act, or has died before the testator, or before he has proved the Will, or when the executor dies after having proved the Will but before he has administered all the estate of the deceased; an universal or a residuary legatee may be admitted to prove the Will, and letters of administration with the Will annexed may be granted to him of the whole estate, or of so much thereof as may be unadministered.

Right to administration of representative of deceased residuary legatee.

197. When a residuary legatee who has a beneficial interest survives the testator, but dies before the estate has been fully administered, his representative has the same right to administration with the Will annexed as such residuary legatee.

Grant of administration when there is no executor, nor residuary legatee, nor representative of such legatee.

198. When there is no executor and no residuary legatee or representative of a residuary legatee, or he declines or is incapable to act, or cannot be found, the person or persons who would be entitled to the administration of the estate of the deceased if he had died intestate, or any other legatee having a beneficial interest, or a creditor, may be admitted to prove the Will, and letters of administration may be granted to him or them accordingly.

Citation to be issued before grant of administration to any legatee other than universal or residuary.

199. Letters of administration with the Will annexed shall not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned, calling on the next of kin to accept or refuse letters of administration.

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